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No.

In the Supreme Court of the United States

DENNIS GRACE, ACTING DIRECTOR OF THE WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL., PETITIONERS

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether taxpayers have standing under Article III of the Constitution to challenge on Establishment Clause grounds the actions of Executive Branch officials pursuant to an Executive Order, where the plaintiffs challenge no Act of Congress, the Executive Branch actions at issue are financed only indirectly through general appropriations, and no funds are disbursed to any entities or individuals outside the government.

PARTIES TO THE PROCEEDINGS

The petitioners, who were sued in their official capacity as defendants-appellees below, are Dennis Grace, Acting Director of the White House Office of Faith-Based and Community Initiatives, Steven McFarland, Director of the Department of Justice Center for Faith-Based and Community Initiatives, Jedd Medefind, Director of the Department of Labor Center for Faith-Based and Community Initiatives, Greg Morris, Director of the Department of Health and Human Services Center for Faith-Based and Community Initiatives, Robert Bogart, Director of the Department of Housing and Urban Development Center for Faith-Based and Community Initiatives, Shayam K. Menon, Director of the Department of Education Center for Faith-Based and Community Initiatives, Therese Lyons, Director of the Department of Agriculture Center for Faith-Based and Community Initiatives, and Andrew Rajec, Acting Director of the Agency for International Development Center for Faith-Based and Community Initiatives.*

Rod Paige, the former Secretary of the United States Department of Education, was a defendant-appellee below, but is not a petitioner in this Court. Elaine L. Chao, Secretary of the United States Department of Labor, Tommy G. Thompson, the former Secretary of the United States Department of Health and Human Services, Alberto R. Gonzales, Attorney General, Dr. Julie Gerberding, Director of the Centers for Disease Control and Prevention, and David Caprara, the former Director of Faith-Based and Community Initiatives at the Corporation for National and Community Service, were originally defendants in the district court, but

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* Pursuant to Supreme Court Rule 35(3), each of the petitioners has been substituted for their predecessors in office, who were the originally named defendants.

were dismissed from the case in district court and were not parties to the appeal. Neither they nor their successors are parties before this Court.

The respondents, who were plaintiffs-appellants below, are Anne Nicol Gaylor, Annie Laurie Gaylor, Dan Barker, and the Freedom from Religion Foundation, Inc., a non-stock corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Dennis Grace, the Acting Director of the White House Office of Faith-Based and Community Initiatives, and the other federal petitioners, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 433 F.3d 989. The order of the court of appeals denying the government's petition for rehearing and rehearing en banc, and the accompanying opinions concurring in and dissenting from the denial of rehearing en banc (App., *infra*, 58a-66a), are reported at 447 F.3d 988. The opinion of the district court denying in part the defendants' motion to dis-

miss the complaint for lack of Article III standing (App., *infra*, 27a-35a), and the final judgment of the district court (App., *infra*, 36a-57a), are unreported.

JURISDICTION

The court of appeals entered its judgment on January 13, 2006. The government's petition for rehearing was denied on May 3, 2006 (App., *infra*, 59a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 2001, the President created by Executive Order the White House Office of Faith-Based and Community Initiatives (White House Office) within the Executive Office of the President. See Exec. Order No. 13,199, 3 C.F.R. 752 (2002). The White House Office has "lead responsibility" within the Executive Branch for establishing policies, priorities, and objectives designed to "expand the work of faith-based and other community organizations to the extent permitted by law." *Id.* § 2. The President's "paramount goal" is to ensure that "private and charitable community groups, including religious ones, * * * have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes." *Id.* § 1. To that end, the White House Office aims "to eliminate unnecessary legislative, regulatory, and other bureaucratic barriers that impede effective faith-based and other community efforts to solve social problems." *Id.* § 3(j).

The President created Executive Department Centers for Faith-Based and Community Initiatives (agency Centers) in a number of federal agencies. See Exec. Order No. 13,198, 3 C.F.R. 750 (2002); Exec. Order No. 13,280, 3 C.F.R. 262 (2003); Exec. Order No. 13,342, 3 C.F.R. 180 (2005); Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (2006). The purpose of those Centers is "to coordinate department efforts to elimi-

nate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services." 3 C.F.R. 750, § 2 (2002).

The President undertook this initiative to ensure that "faith-based organizations [w]ould be eligible to compete for Federal financial assistance used to support social service programs and to participate fully in the social service programs supported with Federal financial assistance without impairing their independence, autonomy, expression, or religious character," as long as they "do[] not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization." Exec. Order No. 13,279, 3 C.F.R. 258, § 2(f) (2003). At the same time, the President directed that "[n]o organization should be discriminated against on the basis of religion or religious belief in the administration of Federal financial assistance under social service programs," *id.* § 2(c), and that "[a]ll organizations that receive Federal financial assistance under social services programs should be prohibited from discriminating against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief," *id.* § 2(d).

2. The Freedom From Religion Foundation and three of its members, who are alleged to be federal taxpayers, App., *infra*, 68a-69a paras. 7-9 (collectively, "Foundation"), filed this action against the Director of the White House Office and the Directors of Centers at the Departments of Justice, Labor, Health and Human Services, Housing and Urban Development, Education, and Agriculture, as well as the Director

of the Center at the Agency for International Development. See *id.* at 67a-80a.[1]

The Foundation contended that the defendant officials violated the Establishment Clause by organizing national and regional conferences at which faith-based organizations allegedly "are singled out as being particularly worthy of federal funding because of their religious orientation, and the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services." App., *infra*, 73a para. 32. The Foundation further alleged that the defendant officials "engage in myriad activities, such as making public appearances and giving speeches, throughout the United States, intended to promote and advocate for funding for faith-based organizations." *Id.* at 77a para. 41. The Foundation also alleged that "Congressional appropriations [are] used to support the activities of the defendants." *Id.* at 79a para. 45.

The Foundation's complaint seeks a declaratory judgment that the officials' activities violate the Establishment Clause, an injunction prohibiting further "use [of] appropriations in violation of the Establishment Clause," and "an order requiring the defendants to establish rules, regulations, prohibitions, standards and oversight to ensure that future appropriations" comport with the Establishment Clause. App., *infra*, 80a. The Foundation and its three members asserted standing based solely on their federal taxpayer status. *Id.* at 68a-69a paras. 4-10.[2]

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[1] Initially, the Foundation also sued David Caprara, the former Director of Faith-Based and Community Initiatives at the Corporation for National and Community Service, and the Director of the Centers for Disease Control and Prevention, but it subsequently voluntarily dismissed the claims against those defendants. App., *infra*, 37a.

[2] Because the Foundation itself is a non-profit entity that is exempt from paying federal income taxes under 26 U.S.C. 501(c)(3), the Foundation lacks taxpayer status in its own right, and can assert it, if

3. Petitioners, the Directors of the White House Office and the agency Centers, moved to dismiss the complaint against them for lack of standing. The district court granted the motion to dismiss. App., *infra*, 27a-35a.

The district court reasoned that federal taxpayer standing is limited to Establishment Clause challenges to the constitutionality of "exercises of congressional power under the taxing and spending clause of Art. I, § 8." App., *infra*, 31a (quoting *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968)). The court held that the challenged activities of the White House Director and the Directors of the agency Centers—organizing conferences and making speeches—"are not 'exercises of congressional power' as required by the *Flast* test." *Id.* at 34a. The court noted that the Director of the White House Office acts "on the President's behalf," and that none of the petitioners is "charged with the administration of congressional programs." *Id.* at 33a, 34a. "The view that federal taxpayers as such should be permitted to bring Establishment Clause challenges to all Executive Branch actions on the grounds that those actions are funded by congressional appropriations," the district court concluded, "has never been accepted by a majority of the Supreme Court." *Id.* at 33a.[3]

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at all, only on behalf of its taxpaying members. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

[3] The district court dismissed the Foundation's claim against former Secretary of Education Rod Paige, and the court of appeals affirmed that dismissal. App., *infra*, 14a-15a, 35a. The Foundation's amended complaint also asserted claims that the heads of certain federal agencies had violated the Establishment Clause by "directly and preferentially fund[ing]" particular programs that allegedly "integrate religion as a substantive and integral component" of their activities. *Id.* at 77a-79a paras. 42, 43. The Foundation voluntarily dismissed all of those claims with the exception of two programs administered by the Secretary of Health and Human Services. The district court subsequently granted summary judgment for the Secretary with respect to one of those

4. A divided court of appeals vacated the district court's order of dismissal and remanded. App., *infra*, 1a-16a.

a. The majority held that "[t]axpayers have standing to challenge an executive-branch program, alleged to promote religion, that is financed by a congressional appropriation, even if the program was created entirely within the executive branch, as by Presidential executive order," as long as the actions of Executive Branch officials are financed by general appropriations. App., *infra*, 16a. In the majority's view, taxpayer standing extends beyond programs that allocate federal funding to third parties, and includes challenges to any Executive Branch activity funded "from appropriations for the general administrative expenses, over which the President and other executive branch officials have a degree of discretionary power," *id.* at 11a, as opposed to funding "from, say, voluntary donations by private citizens," *ibid.* Standing accordingly exists even if "there is no statutory program" enacted by Congress under its Taxing and Spending power, *ibid.*, and even if the taxpayer is "unable to identify the appropriations that fund the [challenged activity]," *id.* at 10a.

The majority noted, however, that standing would not exist to challenge "incidental" expenditures, which it defined as "such cases as that of the government's expenditure on an armored limousine to transport the President to the Capitol to deliver the State of the Union address in which he speaks favorably of religion." App., *infra*, 14a. Because the Foundation challenged a series of Executive Branch activities, however, the court held that the use of general appropriations to finance the officials' actions sufficed to support taxpayer standing under Article III of the Constitution. *Id.* at 16a.

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claims, and for the Foundation with respect to the other. *Id.* at 56a-57a. Neither of those decisions was appealed, and they are not at issue before this Court. *Id.* at 14a-15a. Accordingly, only petitioners remain as potential defendants in any further district court litigation.

b. Judge Ripple dissented. App., *infra*, 16a-26a. In his view, allowing a taxpayer to challenge the conduct of Executive Branch officials "so long as that conduct was financed in some manner by a congressional appropriation" reflects a "dramatic expansion of current standing doctrine." *Id.* at 16a. Judge Ripple reasoned that, by predicating taxpayer standing on the nearly universal use of general appropriations funds to finance the activities of government officials, rather than Congress's specific appropriation of funds to finance the activities of private entities, the majority had "cut[] the concept of taxpayer standing loose from its moorings." *Id.* at 19a. Judge Ripple explained that this Court had first recognized taxpayer standing in Establishment Clause cases to ensure that Congress could not "support[] a sectarian cause through the transfer of public funds," because that was "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption." *Id.* at 22a (quoting *Flast*, 392 U.S. at 103).

Judge Ripple criticized the majority for abandoning *Flast*'s "narrow terms," App., *infra*, 19a, which have required that "a plaintiff must bring an attack against a disbursement of public funds made in the exercise of *Congress'* taxing and spending power," *id.* at 22a. The majority's approach, Judge Ripple observed, now "makes virtually any executive action subject to taxpayer suit" because "[t]he executive can do nothing without general budget appropriations from Congress." *Id.* at 24a. In Judge Ripple's view, the majority's decision "expand[s] the narrow concept of taxpayer standing to the point where it cannot be distinguished from the citizen standing that the Supreme Court has regarded * * * as destructive of the case and controversy limitation on the power of the federal courts." *Ibid.*

In so doing, Judge Ripple concluded, the majority "sets this circuit on a course different from that of the other courts

to have applied the *Flast* exception." App., *infra*, 24a (citing *District of Columbia Common Cause* v. *District of Columbia*, 858 F.2d 1 (D.C. Cir. 1988); *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), cert. denied, 495 U.S. 918 (1990)).

5. By a vote of 7-4, the court of appeals denied the government's petition for rehearing en banc. However, two of the judges that voted against rehearing en banc filed separate opinions explaining that further review by the Seventh Circuit was not warranted because "the obvious tension which has evolved in this area of jurisprudence * * * can only be resolved by the Supreme Court," and "the needed consideration of this important issue by that tribunal would be unnecessarily delayed by our further deliberation." App., *infra*, 59a (Flaum, C.J., concurring in the denial of rehearing en banc); see *id.* at 60a (Easterbrook, J., concurring in the denial of rehearing en banc) (explaining that the court's decision on a matter that "put[s] the judicial and the political branches of the federal government at odds impl[ies] the wisdom of further review," and "[m]y vote to deny rehearing rests on a conclusion that this is not the right forum for that further deliberation").

Four judges (Ripple, J., joined by Manion, Kanne, and Sykes, JJ.) dissented from the denial of rehearing en banc, App., *infra*, 63a-66a, stating that the panel's decision "has serious implications for judicial governance," and "departs significantly from established Supreme Court precedent and creates an inter-circuit conflict," *id.* at 63a. As the dissent explained, "the Supreme Court, in making an exception to usual standing rules for taxpayers has drawn a very clean line in order to avoid making the federal courts a forum for all sorts of complaints about the conduct of governmental affairs on no basis other than citizen standing." *Id.* at 65a. In the dissenters' view, the majority's decision contravened that

"very clear line," and "[a]bolishing or even diluting a standard so explicitly set by the Supreme Court simply is not an appropriate decision for us to make." *Ibid.*

REASONS FOR GRANTING THE PETITION

The divided court of appeals' decision in this case transforms taxpayer standing in the Establishment Clause context from a narrow exception, designed to prevent the specific historic evil of direct legislative subsidization of religious entities, into a roving license for any "individual citizen to challenge any action of the executive with which he disagrees, as violative of the Establishment Clause." App., *infra*, 24a (Ripple, J., dissenting). The court's decision not only cuts taxpayer standing from its constitutional and historical moorings, but also contravenes this Court's precedents and the decisions of other circuits. Indeed, the far-reaching implications of the court's ruling—and its sharp departure from this Court's teachings—prompted more than half of the Seventh Circuit's judges to take the extraordinary step of calling for this Court's review of the decision. See *id.* at 59a (Flaum, C.J., concurring in the denial of rehearing en banc), 59a-62a (Easterbrook, J., concurring in the denial of rehearing en banc), 63a-66a (Ripple, J., joined by Manion, Kanne, & Sykes, JJ., dissenting from the denial of rehearing en banc). The Court should grant certiorari and reaffirm the fundamental limits on taxpayer standing in this context.

A. The Seventh Circuit's Decision Contradicts The Clear Teachings Of This Court's Taxpayer Standing Cases

The court of appeals' decision conflicts sharply with decisions of this Court strictly limiting the circumstances in which a plaintiff's taxpayer status alone confers Article III standing.

1. a. Article III of the Constitution confines the judicial power to the resolution of actual "Cases" and "Controversies." U.S. Const. Art. III, § 2. An "essential and unchanging" com-

ponent of that requirement is the rule that a plaintiff invoking the jurisdiction of the federal courts must have standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing" requires that the plaintiff, *inter alia*, "have suffered an 'injury in fact'" in the form of the "invasion of a legally protected interest," that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation marks and citations omitted).[4]

This Court has generally rejected taxpayer status as a proper basis on which to predicate Article III standing, because a federal taxpayer's interest in the moneys of the treasury "is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Frothingham* v. *Mellon*, 262 U.S. 447, 487 (1923). "Standing has been rejected in such cases because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally,'" and because the injury "is not 'actual or imminent,' but instead 'conjectural or hypothetical.'" *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1862 (2006) (citations omitted). "Proper regard for the complex nature of our constitutional structure

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[4] To establish standing, a plaintiff also must demonstrate traceability and redressability. In other words, the plaintiff must identify a "causal connection between the injury and the conduct" of which he complains, such that the alleged injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court," and the plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-561 (internal quotation marks and citations omitted).

requires" that courts not "hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982).

b. In *Flast* v. *Cohen*, 392 U.S. 83 (1968), this Court recognized a narrow exception to the general prohibition on taxpayer standing. The Court held that a taxpayer could bring an Establishment Clause challenge to Congress's exercise of its taxing and spending power to provide federal funding to private religious schools. *Id.* at 102-104. The Court underscored, however, that taxpayer standing would extend "only [to] exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution" that are challenged on Establishment Clause grounds. *Id.* at 102. The Court made clear that it did not suffice "to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute," and pointed as an example to the complaint in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), that publicly funded school teachers engaged in religious activities pursuant to a state law calling for the reading of the Bible in public school. The Court rejected that claim as a basis for taxpayer standing. [5]

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[5] *Flast* also held that the taxpayer must allege that Congress's exercise of its legislative power "exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power," like the Establishment Clause's prohibition on the disbursement of tax dollars to religious entities, 392 U.S. at 102-103. The Court has never held that any other constitutional constraint on Congress's taxing and spending power would support taxpayer standing. See *DaimlerChrysler*, 126 S. Ct. at 1864 ("[O]nly the Establishment Clause has supported federal taxpayer suits since *Flast*.") (internal quotation marks and citation omitted).

That narrow departure in *Flast* from Article III's general prohibition on taxpayer standing was warranted, in the Court's view, because "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Flast*, 392 U.S. at 103. The Court thus grounded the type of personal injury needed to establish taxpayer standing in this context on the historic constitutional concern that a taxpayer not be "force[d] * * * to contribute three pence only of his property for the support of any one establishment." *Ibid.* (citation omitted). Given the unique constitutional and historical pedigree of the concern with the contribution of money raised by the government to outside religious entities—which the Court tied to Madison's "famous Memorial and Remonstrance Against Religious Assessments," *ibid.*—the Court held that an individual's claim that "his tax money is being extracted and spent in violation of [that] specific constitutional protection[] against such abuses of legislative power" could support Article III standing. *Id.* at 106.

c. In the ensuing four decades, this Court has consistently reaffirmed that *Flast* is a "narrow" and rarely invoked exception to the rule that taxpayer status is insufficient to establish Article III standing. *DaimlerChrysler*, 126 S. Ct. at 1865; see *Bowen* v. *Kendrick*, 487 U.S. 589, 618 (1988) ("[W]e have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing established in *Frothingham*."); *Valley Forge*, 454 U.S. at 481 (discussing the "rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied").

This past Term the Court reiterated that *Flast* has a "narrow application in our precedent," *DaimlerChrysler*, 126 S. Ct. at 1865, and is strictly limited to a challenge to "congressional action under the taxing and spending clause"

claimed to be "in derogation of the Establishment Clause," *id.* at 1864 (quoting *Flast*, 392 U.S. at 105-106). The Court stressed that taxpayer standing exists in that particular context—and no other—because Congress's "extract[ion] and spen[ding] of tax money in aid of religion," is "fundamentally unlike" an alleged violation of "almost any [other] constitutional constraint on government power," given the historical constitutional imperative of protecting citizens against "contribut[ing] three pence . . . for the support of any one [religious] establishment." *Id.* at 1864-1865. Thus, "the 'injury' alleged in Establishment Clause challenges to federal spending" that may give rise to standing is "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion alleged by a plaintiff." *Id.* at 1865.

Likewise, in *Valley Forge*, the Court emphasized that the limits to the narrow *Flast* exception must be applied with "rigor," 454 U.S. at 481, and rejected taxpayer standing where the plaintiffs challenged "not a congressional action, but a decision by [a federal agency] to transfer a parcel of federal property." *Id.* at. 479. The Court explained that, while the agency's actions necessarily entailed the use of tax money, "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing." *Id.* at 477. Rather, the Court reaffirmed, taxpayer standing is confined to "challenges directed only [at] exercises of congressional power." *Id.* at 479 (internal quotation marks omitted). A constitutional objection to "a particular Executive Branch action arguably authorized by [an] Act [of Congress]" will not suffice. *Id.* at 479 n.15.[6]

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[6] See also *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227-228 (1974) (finding no taxpayer standing in a suit where the plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status"); *United States* v. *Richard-*

Finally, in *Bowen* v. *Kendrick*, the Court reaffirmed that taxpayer standing does not exist to challenge, on Establishment Clause grounds, "an incidental expenditure of tax funds in the administration of an essentially regulatory statute." 487 U.S. at 619 (quoting *Flast*, 392 U.S. at 102). At the same time, *Bowen* held that a statutory spending program enacted pursuant to Congress's power to tax and spend does not fall outside the *Flast* rule just because it is administered by Executive Branch officials. See *ibid.* The Court explained that a challenge to "administratively made grants" fits *Flast*'s mold because the authorizing statute "is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the [Act]'s statutory mandate." *Id.* at 619-620. The claim that "funds are being used improperly by individual grantees is [no] less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary [of Health and Human Services]." *Id.* at 619. The key point was that the taxpayers' allegations "call[ed] into question how * * * funds authorized by Congress are being disbursed pursuant to * * * statutory mandate." *Id.* at 620.

2. The court of appeals' holding that the Foundation has taxpayer standing to challenge an Executive Branch's program, alleged to promote religion, without challenging either a specific congressional appropriation or a direct transfer of funds to a religious entity, just because the Executive Branch's activity "is financed by a congressional appropria-

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son, 418 U.S. 166, 175 (1974) (holding that a taxpayer lacks standing to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the CIA, because that challenge was "not addressed to the taxing or spending power, but to the statutes regulating the CIA").

tion," App., *infra*, 16a, flatly contradicts that precedent in three fundamental respects.

First, an essential prerequisite to taxpayer standing is a "challenge[] directed only [at] exercises of *congressional* power" under the Taxing and Spending Clause. *Valley Forge*, 454 U.S. at 479 (internal quotation marks omitted) (emphasis added); *Flast*, 392 U.S. at 106 (challenge must be to "congressional action under the taxing and spending clause" allegedly in derogation of the Establishment Clause); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 225 n.15 (1974) ("[T]he *Flast* nexus test is not applicable where the taxing and spending power is not challenged.").

The Foundation, however, challenges Executive—not congressional—action in this case. The Foundation's complaint does not ask the Court to invalidate any congressional action, on its face or as applied, or even any specific Executive Branch decision to transfer funds to an outside entity. See App., *infra*, 60a ("[P]laintiffs in this litigation do not say that they have paid one extra penny because of the [conduct at issue].") (Easterbrook, J., concurring in the denial of rehearing en banc); *id.* at 64a ("Here, as in *Valley Forge*, the plaintiffs do not complain of any action taken by Congress.") (Ripple, J., dissenting from the denial of rehearing en banc).

The Foundation challenges only the fact that Executive Branch officials have decided to dedicate their time and attention to certain issues and events, such as the organization and conduct of various conferences.[7] The fact that those executive

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[7] See App., *infra*, 77a para. 40 (challenging the "actions and/or words" of Executive Branch officials); *id.* at 75a-76a paras. 34, 35 (challenging the content of presidential speeches); *id.* at 77a para. 41 (challenging Executive Branch officials' "myriad activities, such as making public appearances and giving speeches"); *id.* at 73a para. 32 (challenging Executive Branch officials' "support of national and regional conferences"); *id.* at 76a-77a paras. 36, 39 (challenging Executive Branch

activities are funded by general appropriations, however, does not transform the Foundation's complaint into a challenge to "*congressional action* under the taxing and spending clause" allegedly in derogation of the Establishment Clause. *Flast*, 392 U.S. at 106 (emphasis added). The gravamen of the complaint is not that Congress has appropriated funds to pay the salaries and expenses of Executive Branch officials, but that Executive Branch officials have made discretionary judgments about how to spend their time (and indirectly taxpayer money) in an impermissible manner. The challenge goes to the Executive's "use" of general appropriations. App., *infra*, 79a para. 44. But, unlike *Kendrick*, it challenges only the use of such general appropriations to fund internal Executive Branch activities, as opposed to specific spending decisions made pursuant to a challenged "statutory mandate." 487 U.S. at 620.[8]

Second, in the absence of a legislative program calling for the disbursement of federal funds to private entities, there is no "logical link," *Flast*, 392 U.S. at 102, between the Founda-

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officials' organization and conduct of conferences).

[8] As noted above, note 3, *supra*, the Foundation did challenge the administration of a specific statutory grant program—"Mentoring Children of Prisoners," which was established by Congress pursuant to the Promoting Safe and Stable Families Amendments of 2001, Pub. L. No. 107-133, § 121, 115 Stat. 2419 (42 U.S.C. 629i (Supp. III 2003))—that authorized funding faith- and community-based organizations. The Foundation argued that the disbursement of funds pursuant to that program to a religious organization violated the Establishment Clause. The district court recognized taxpayer standing to challenge that specific grant and granted summary judgment to the Foundation on that claim, but that aspect of the district court's decision was not appealed. See note 3, *supra*; App., *infra*, 20a-22a (Ripple, J., dissenting). That allegation, unlike the ones that are before the Court, was focused on the exercise of Congress's taxing and spending power and the disbursement of funds to religious entities.

tion's allegations and its members' taxpayer status, and thus no "injury" that could give rise to Article III standing. In both *Flast* and *Kendrick*—the only two cases in which this Court has upheld taxpayer standing—the taxpayers challenged congressionally authorized programs that distributed federal funds to private entities, including religious organizations. In *Flast*, the Court observed that "[t]he gravamen of the appellants' complaint was that federal funds appropriated under the Act were being used to finance instruction in * * * religious schools." 392 U.S. at 85. Likewise, in *Kendrick*, the Court stressed that the plaintiffs' constitutional objections were to the "disbursement of funds" and "how the funds authorized by Congress are being disbursed" to sectarian grantees. 487 U.S. at 619-620; see *id.* at 619 (taxpayer standing sustained because congressionally authorized funds "flowed through" the agency to private grantees).

The Foundation's challenge, by contrast, is analogous to the taxpayer challenge in *Doremus*, which *Flast* pointed to as an example of an insufficient taxpayer injury. In *Doremus*, tax funds would pay teacher salaries whether or not the teachers read from the Old Testament. Likewise, here, the only appropriations at issue are the general appropriations that pay for the federal officials' salaries and offices, which would be appropriated whether or not the officials engaged in the conduct respondents challenge.[9]

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[9] In *Doremus*, the Court, in an opinion by Justice Jackson, emphasized that the alleged Establishment Clause violation—a state law authorizing the reading of Bible passages in public schools—was not "supported by any separate tax or paid for from any particular appropriation," and did not "add[] any sum whatever to the cost of conducting the school." 342 U.S. at 433. The Court contrasted the case with *Everson* v. *Board of Education*, 330 U.S. 1 (1947), in which the plaintiff "showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of." *Doremus*, 342 U.S. at 434. The Court accordingly concluded, in

A challenge to the disbursement of funds to religious entities is a critical prerequisite for taxpayer standing because such outlays trigger the unique historic concern upon which *Flast*'s narrow exception rests. *Flast* concluded that the Framers' particular concern with the use of federal tax funds to finance or subsidize churches or the clergy meant that each taxpayer has a singular interest in ensuring that his "three pence" not be extracted and spent to support a church. *Flast*, 392 U.S. at 103. As the Court explained—citing to Madison's *Memorial and Remonstrance Against Religious Assessments*—the Establishment Clause was specifically designed to prevent the use of the "taxing and spending power" to support religious entities. *Ibid.* That "specific evil," *ibid.*, arises directly and exclusively out of an exercise of the taxing and spending power. The funding of religious entities by the government thus uniquely triggers a historically recognized individualized injury rooted solely in the Taxing and Spending Clause, which no other Establishment Clause or constitutional violation causes. It is that special history, and that history alone, that explains why this particular usage of taxpayer funds gives rise to taxpayer standing, when all other taxpayer-standing claims are foreclosed by Article III.

While recognizing that every taxpayer has a concern with disbursements to churches might be understood as relaxing the general rule that the injury be particularized—or at least infusing the rule with a special historic meaning in this context—the requirement of a congressionally authorized disbursement to a third party has the added benefit of ensuring that the dispute is concrete and crystallized. Here, the court of appeals allowed a challenge to internal Executive Branch

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Doremus, that "[i]t is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference." *Ibid.*; see *Valley Forge*, 454 U.S. at 477-478 (discussing *Doremus*).

prioritizations that may or may not ever result in concrete decisions to make disbursements to religiously-affiliated entities. To the extent such awards are made pursuant to a statutory mandate, they can be challenged either by taxpayers (as was true of challenges to specific grants in this very case) or by others, such as interested, non-religious grantees, who presumably would have standing under traditional Article III principles (without regard to whether a grant is made pursuant to a statutory mandate). But allowing a challenge to executive decisions that do not result in grants would open the courthouse door to abstract and generalized grievances that Executive Branch officials are too solicitous of religious entities. Indeed, that appears to be the essence of the Foundation's claims.

To establish the requisite taxpayer injury to support standing, a plaintiff therefore must challenge the disbursement of funds to private religious entities, either directly by an Act of Congress, as in *Flast*, or by an agency at Congress's specific direction, as in *Kendrick*. Alleging nothing more than a link between the challenged governmental activity and the funding of Executive Branch operations from general appropriations is too attenuated a claim to give rise to taxpayer standing. Cf. *Valley Forge*, 454 U.S. at 480 n.17 ("[A]ny connection between the challenged property transfer and respondents' tax burden is at best speculative and at worst nonexistent."). In other words, the Foundation has alleged at most a generalized grievance concerning executive action, not the kind of concrete congressional extraction and disbursement of funds that gives rise to Article III standing under *Flast*.

Third, by disregarding those fundamental principles, the court of appeals has loosed taxpayer standing from its constitutional and historical moorings. There was no Memorial and Remonstrance against the use of general legislative appropriations to finance the operations of a coordinate branch of gov-

ernment. Nor were executive meetings or communications with religious groups, religious references in public speeches, or any other operational activity of Executive Branch officials among the "*specific* evils feared by those who drafted the Establishment Clause." *Flast*, 392 U.S. at 103 (emphasis added).[10]

Quite unlike the specific historic evil that the *Flast* exception was designed to address, no federal funds in this case were disbursed to any religious entity, and the "plaintiffs in this litigation do not say that they have paid one extra penny because of the [executive actions at issue]." App., *infra*, 60a (Easterbrook, J., concurring in the denial of rehearing en banc). The Foundation's interest in ensuring that Executive Branch officials comport their speech and conduct their meetings in compliance with its view of the Establishment Clause has no distinct historical grounding or status. Taxpayers paid the President's salary when President Washington issued the first Thanksgiving Day Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer" for "the many and signal favors of Almighty God." *Van Orden* v. *Perry*, 125 S. Ct. 2854, 2861 (2005) (citation omitted). They also paid the salary of President Lincoln when he delivered the Gettysburg Address, with its "extensive acknowledgments of God." *Id.* at 2863 n.9. But concern about

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[10] Quite the opposite, religious themes appear frequently in the Nation's founding documents and the speeches and letters of the Framers. See, *e.g.*, *Van Orden* v. *Perry*, 125 S. Ct. 2854, 2859 (2005) ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.") (quoting *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 213 (1963)); *id.* at 2861-2862 (citing additional examples); cf. *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005) ("Citizens * * * have no First Amendment right not to fund government speech.").

a President's decision to spend time in such endeavors is nothing more than an abstract, generalized grievance. There is nothing individualized, concrete or particularized about that injury, beyond "the psychological consequence presumably produced by observation of conduct with which one disagrees," which is plainly insufficient to support standing. *Valley Forge*, 454 U.S. at 485; see App., *infra*, 60a (Easterbrook, J., concurring in the denial of rehearing en banc) ("Where's the concrete injury? The loss (if any) is mental distress that plaintiffs, who are bystanders to the challenged program, suffer by knowing about conduct that they deem wrongful.").

The court of appeals considered it necessary to expand the capacity of every taxpayer to police the Executive Branch's compliance with the Establishment Clause "because there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause." App., *infra*, 13a. But the Republic has endured for more than 200 years without such an extravagant concept of taxpayer standing, and courts are not free to craft standing principles based on the presumption that the Executive Branch will flout the Establishment Clause or any other constitutional command. Cf. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) ("[C]ourts presume that [public officers] have properly discharged their official duties.") (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 15 (1926)). Furthermore, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge*, 454 U.S. at 489 (citation omitted). That approach "would convert standing into a requirement that must be observed only when satisfied." *Ibid.*

In any event, this is *not* a context in which plaintiffs could not be found for any concrete action that might ultimately emerge from the executive's encouragement of religiously-

affiliated entities to participate in funding programs. *Flast* and *Kendrick* would allow taxpayer challenges to any actual disbursements pursuant to statute, as demonstrated by this very case, see note 3, *supra*. And, even apart from *Flast*, a disappointed non-religious grantee would have standing to sue. To the extent there would be no available plaintiff to challenge the preliminary deliberative process that led to the grant, that is only because deliberations, apart from the disbursement of funds, inflict, at most, an inchoate injury.

Beyond that, the court of appeals' rationale defies this Court's decision in *Valley Forge* that "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing." 454 U.S. at 477. Indeed, the proposition that "the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are [just] * * * nuisances that may be dispensed with when they become obstacles to that transcendent endeavor * * * has no place in our constitutional scheme." *Id.* at 489.

Under the court of appeals' decision, however, only counsel's creativity in crafting the complaint stands as an obstacle to tens of millions of taxpayers obtaining standing to act as monitors of the government's Establishment Clause compliance. Indeed, under the Seventh Circuit's decision, the result in *Valley Forge* was a product of pleading error, not constitutional limitation. Had the plaintiffs simply asserted a taxpayer injury based on the use of "appropriations for the general administrative expenses" involved in selling federal property to a religious group, App., *infra*, 11a, the plaintiffs could have asserted taxpayer standing under the decision below. See *Valley Forge*, 454 U.S. at 467-468 (describing administrative measures involved in the property sales).

"[S]uch a broad application of *Flast*'s exception to the general prohibition on taxpayer standing [is] quite at odds with its narrow application in [this Court's] precedent and

Flast's own promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances.'" *DaimlerChrysler*, 126 S. Ct. at 1865. Indeed, if interpreted in that open-ended fashion, *Flast* could not stand with the precedents of this Court—both before and after *Flast*—that faithfully apply the limits of Article III and the taxpayer standing doctrine. The court of appeals' sharp break with this Court's taxpayer standing precedents, and the fundamental separation-of-powers principles on which they are grounded, accordingly merits this Court's review.

B. The Seventh Circuit's Decision Conflicts With The Decisions Of Other Circuits That Have Faithfully Applied This Court's Taxpayer Standing Cases

As noted by the four Seventh Circuit judges who dissented from the denial of rehearing en banc, the court's decision not only contravenes this Court's precedents, but also conflicts with rulings of other circuits. App., *infra*, 24a-26a, 65a-66a.

In *American Jewish Congress* v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978), the plaintiffs, like the Foundation here, filed suit on the ground that "executive officials" "expended governmental funds to effectuate cooperative programs" with third parties in a manner that violated, *inter alia*, the First Amendment. *Id.* at 944. The District of Columbia Circuit held, however, that the claim to federal taxpayer standing "falter[ed]" because the plaintiffs' allegations were "directed at executive action rather than at a congressional enactment under article I, section 8" (*i.e.*, Congress's taxing and spending authority). *Ibid.* As a result, "the general rule that a federal taxpayer's interest in Treasury moneys is too indeterminate, remote, and abstract to support standing" compelled the conclusion that the plaintiffs lacked standing. *Ibid.* See *Public Citizen, Inc.* v. *Simon*, 539 F.2d 211, 218-219 (D.C. Cir. 1976) (no taxpayer standing to challenge "mere executive

activity that entails some expenditures"—*viz.*, requiring the Secretary of the Treasury to recoup allegedly improper salary payments to White House staff members).

Thus, had the Foundation challenged in the District of Columbia Circuit the petitioners' "cooperation in programs" with religious entities, *American Jewish Congress*, 575 F.2d at 941, based on the fact that such "executive activity * * * entails some expenditures" of taxpayer funds, *Simon*, 539 F.2d at 218, the claim to taxpayer standing that the Seventh Circuit upheld here would have been rejected. The District of Columbia Circuit, unlike the Seventh Circuit, refuses "to recognize taxpayer standing to attack any executive action" simply because it "draws on an outstanding appropriation." *Id.* at 217.

The Second Circuit likewise has hewed to this Court's careful limitations on taxpayer standing. In *In re United States Catholic Conference*, 885 F.2d 1020 (1989), cert. denied, 495 U.S. 918 (1990), the Second Circuit held that taxpayers lacked standing to challenge the IRS's failure to revoke the tax-exempt status of the Catholic Church. The court reasoned that the plaintiffs' asserted injury "center[ed] on an alleged decision made solely by the executive branch," and thus lacked a "nexus * * * [to] Congress' exercise of its taxing and spending power." *Id.* at 1028. In the Second Circuit's view, taxpayer standing requires more than the application or expenditure of governmental resources. That court deems the disbursal of funds pursuant to congressional direction to be critical. "[T]axpayer standing exists to challenge the executive branch's administration of a taxing and spending statute" where "Congress [has] decided how the [Act's] funds were to be spent, and the executive branch, in administering the statute, was merely carrying out Congress' scheme." *Id.* at 1027. Accordingly, the claim of taxpayer standing in the case at hand—which involves no challenge to Congress's exercise of

its taxing and spending power, or to the Executive Branch's distribution of funds pursuant to congressional direction—would have been resolved differently had it arisen within the Second Circuit.

That conflict in the circuits creates a profound disparity in the government's susceptibility to suit at the behest of taxpayers alleging Establishment Clause violations and warrants prompt resolution by this Court.

C. The Question Presented Is Of Fundamental Importance And Warrants This Court's Immediate Review

This is the unusual case where a majority of the judges on the court of appeals have specifically emphasized the need for this Court's review of the question presented. App., *infra*, 59a, 60a, 66a. Proper application of this Court's taxpayer standing precedent is an issue that "is both recurring and difficult." *Id.* at 59a (Easterbrook, J., concurring in the denial of rehearing en banc); see *id.* at 66a (Ripple, J., joined by Manion, Kanne, & Sykes, JJ., dissenting from the denial of rehearing en banc) (explaining that this case raises "an important federal question"). Expansion of taxpayer standing in this fashion threatens a considerable amount of novel litigation. Indeed, within three months of the court's decision here, the Seventh Circuit loosened the reins on taxpayer standing in another respect, holding that it supports suits for equitable restitution against private entities. *Laskowski* v. *Spellings*, 443 F.3d 930 (2006) (as amended on reh'g (July 26, 2006)).[11]

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[11] Unlike this case—which is focused on executive activities that do not involve the disbursement of funds to private entities—*Laskowski* involved a taxpayer complaint of "direct financial support by the government of religious activities," by means of a specific congressional appropriation of funds to the University of Notre Dame for distribution to other religious colleges. 443 F.3d at 933. The district court dismissed the action as moot because Notre Dame had already received and spent the federal funds at issue. The Seventh Circuit reversed,

As Judge Ripple explained, the rationale adopted by the decision below "makes virtually any executive action subject to taxpayer suit," since "[t]he executive can do nothing without general appropriations from Congress." App., *infra*, 24a. While the majority declined to recognize taxpayer standing to challenge comments in a speech by the Secretary of Education, *id.* at 14a-15a, there is, in Judge Easterbrook's words, no "coherence in * * * a doctrine" that permits taxpayers to challenge executive action that is funded only indirectly through general appropriations, but then attempts to draw lines between the costs of different types of executive action funded by such appropriations. *Id.* at 62a. Creating a coherent *de minimis* limitation on the court of appeals' novel expansion of *Flast* is particularly problematic in light of *Flast*'s grounding in the Remonstrance's prohibition of a mere three-pence of governmental support. See *id.* at 61a-62a ("If money from the Treasury is to supply the identifiable trifle for standing, then the only tenable line is between $0 (no cost to taxpayers as a whole) and $1 (some cost, however dilute); yet the panel draws

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holding that the recipient of a federal grant may be ordered, at the behest of a private individual, to repay to the U.S. Treasury the grant funds under the doctrine of restitution. As Judge Sykes explained in dissent, "[i]mplicit" in the majority's decision was a determination "that taxpayers have standing to sue a private federal grant recipient for restitution where the government is alleged to have committed an Establishment Clause violation in making or monitoring the grant." *Id.* at 942. "Taxpayer standing under *Flast*," Judge Sykes explained, "has never been understood to encompass such a claim." *Ibid.* The theory of taxpayer standing adopted in this case is, if anything, even further removed from *Flast* than the one in *Laskowski*, because it does not involve any congressional appropriation or grant of federal funds to a private entity and, instead, is limited solely to the Executive's own activities. The Seventh Circuit's decision in *Laskowski* nonetheless underscores the need for this Court to provide further guidance on the jurisdictional limits recognized in *Flast*.

a line between $500,000 and $50,000 or $5,000 (even if there are lots of speeches or proclamations at $5,000 or $50,000 apiece.").

Furthermore, the court of appeals' expansion of taxpayer standing to pursue generalized grievances could render the Seventh Circuit a virtually universal forum for Establishment Clause challenges to Executive Branch action, thereby depriving the government of the protections of other circuits' adherence to this Court's precedent. Due to the national character of most federal governmental activity, anyone nursing a generalized grievance against the federal executive is likely to be able to locate a like-minded taxpayer residing within the Seventh Circuit. Indeed, while the taxpayers in this case reside within the Seventh Circuit, the activities of which they complained spanned the Country. See App., *infra*, 68a-69a paras. 4-9; *id.* at 76a para. 35 (objecting to the content of a presidential speech in Los Angeles); *id.* at 77a para. 42 (challenging activities in Tennessee, Georgia, and Colorado). Accordingly, all it will take to subject the federal government to a taxpayer suit is an objection by one of the more than 11 million federal taxpayers within the Seventh Circuit to executive action on Establishment Clause grounds, regardless of how many other federal taxpayers in other jurisdictions would have had their challenges dismissed out of court.[12]

Finally, review of this case is warranted because it involves an important question of constitutional law concerning the delicate balance of power between the Judicial and Executive Branches. Indeed, as the Court observed last Term, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation

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[12] United States Census Bureau, *State and Metropolitan Area Data Book: 2006*, at 109, Table A-79 (visited July 28, 2006) <http://www.census.gov/compendia/ smadb/TableA-79.pdf>.

of federal-court jurisdiction to actual cases or controversies," including the standing requirement. *DaimlerChrysler*, 126 S. Ct. at 1861 (internal quotation marks omitted). The Seventh Circuit's unprecedented expansion of taxpayer standing "has serious implications for judicial governance," App., *infra*, 63a (Ripple, J., joined by Manion, Kanne, & Sykes, JJ., dissenting from the denial of rehearing en banc), and threatens the very accretion of judicial power against which this Court's taxpayer standing cases have consistently guarded. The Executive Branch's constitutionally rooted concerns about that alteration in the balance of separated powers merit this Court's considered review. Furthermore, such broad lower court division, both within the Seventh Circuit and between the circuits, on a question that "put[s] the judicial and the political branches of the federal government at odds impl[ies] the wisdom of further review." *Id.* at 60a (Easterbrook, J., concurring in the denial of rehearing en banc).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2006

APPENDIX A

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL., PLAINTIFFS-APPELLANTS,

v.

ELAINE L. CHAO, SECRETARY OF DEPARTMENT OF LABOR, ET AL., DEFENDANTS-APPELLEES

No. 05-1130

Argued: Sept. 13, 2005.
Decided: Jan. 13, 2006.

Before: POSNER, RIPPLE, and WOOD, Circuit Judges.

POSNER, Circuit Judge.

The question presented by this appeal is whether a taxpayer can ever have standing under Article III of the Constitution to litigate an alleged violation of the First Amendment's establishment clause unless Congress has earmarked money for the program or activity that is challenged. The district judge thought not, and would have been correct in his thinking under an earlier view of Article III's limitation of the federal judicial power to deciding "Cases" and "Controversies." It was once thought that these terms (which "are, for all intents and purposes, synonymous," *Jones v. Griffith*, 870 F.2d 1363, 1366 (7th Cir. 1989)) limited federal jurisdiction to cases in which the plaintiff alleged the kind of injury that would have supported a lawsuit in the eighteenth century. In the words of Justice Frankfurter, "Both by what they said and by what they im-

plied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.' . . . Even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law." *Coleman v. Miller*, 307 U.S. 433, 460, 59 S. Ct. 972, 83 L.Ed. 1385 (1939) (concurring opinion).

In line with Justice Frankfurter's thinking, *Doremus v. Board of Education*, 342 U.S. 429, 433-34, 72 S. Ct. 394, 96 L.Ed. 475 (1952), rejected taxpayer standing as inconsistent with Article III, cf. *Frothingham v. Mellon*, 262 U.S. 447, 488, 43 S. Ct. 597, 67 L.Ed. 1078 (1923), though a taxpayer could sue in state court to enforce his federal right if the state didn't impose as rigorous a standing requirement as Article III does. See, e.g., *Appleton v. Menasha*, 142 Wis.2d 870, 419 N.W.2d 249, 252-53 (1988). The tangible harm to the taxpayer complaining of the expenditure was too attenuated to satisfy eighteenth-century notions of standing embodied in Article III. Indeed, the tangible harm would often be zero because if the complained-of expenditure was enjoined, the money would probably be used to defray some other public expense that would not benefit the taxpayer, rather than returned to him in the form of a lower tax rate.

Notions of standing have changed in ways to induce apoplexy in an eighteenth-century lawyer. For example, *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331, 119 S. Ct. 765, 142 L. Ed. 2d 797 (1999), upheld standing to challenge the use of statistical sampling for the decennial census; the mere "threat of vote dilution" as a result of the methodology was deemed sufficiently concrete, actual, and imminent to confer standing. *Federal Election Commission v. Akins*, 524 U.S. 11, 20-25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998), upheld standing to sue for lists of donors to political action committees, on the ground "that the information would help [the committees] (and others to whom they would communicate it) to evaluate candidates for public office." *Bush v. Vera*, 517 U.S. 952, 958, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (plurality opinion), upheld the standing of voters who lived in newly created majority-minority congressional districts to challenge them as racially gerrymandered on the ground that such districting denied them equal treatment. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995), assumed (without discussion) that there was taxpayer and voter standing to challenge a state constitutional amendment that provided that no candidate could be on the ballot who had already served either three terms in the House of Representatives or two terms in the Senate.

And with specific reference to the establishment clause, consider our decision in *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 267-69 (7th Cir. 1986), where we considered how much (or rather how little) injury is required to establish conventional (not even taxpayer) standing in an establishment-clause case. We thought it enough that the plaintiffs,

who objected to the prominent display of a cross on public property at Christmas time, had "been led to alter their behavior—to detour, at some inconvenience to themselves, around the streets they ordinarily use," in order to avoid having to see the cross. *Id.* at 268. "The curtailment of their use of public rights of way" was injury enough to support their suit. *Id.* In reaching this conclusion we relied on *Abington School District v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963), where the Supreme Court had held that schoolchildren and their parents had standing to complain that the reading of the Bible and the recitation of the Lord's Prayer in the public school that the children attended violated the establishment clause. The specific injury to the plaintiffs could have been averted by the parents' taking their children out of the public school and putting them in a secular private school (or by moving to another public school district), but those options did not deprive the plaintiffs of standing because it was an injury to them to take their children out of the public school, just as it was an injury to the plaintiffs in the *St. Charles* case that they had to detour to avoid the direct effect on them of the alleged violation (in effect, to mitigate their damages). No such ground of standing is claimed here, however; it is taxpayer standing or nothing for these plaintiffs.

It was not long after *Schempp* that the Supreme Court decided *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), in favor of a taxpayer challenge in federal court to an alleged violation of the establishment clause. Congress had appropriated money for grants of financial assistance to private as well as public schools, and the plaintiffs complained that insofar as some of the grants had been made to paro-

chial schools, the statute violated the establishment clause. The Court interpreted *Frothingham* and *Doremus* as having rested not on Article III—not on the notion that the injury that a taxpayer sustains if his taxes are used for a purpose offensive to him is too slight (in the Frankfurterian originalist conception) to sustain a case or controversy in the Article III sense—but rather on what have come to be called the "prudential" principles of standing. These are judge-made principles illustrated by *Warth v. Seldin*, 422 U.S. 490, 509, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), that deny standing to someone who has been injured as a result of the defendant's conduct (the core standing requirement of Article III) but who is not the "right" person to bring suit, maybe because someone has been injured more seriously and should be allowed to control the litigation.

An example of the prudential limitations on standing is the judge-made "indirect purchaser" doctrine of antitrust law that denies a right of action to a purchaser from a purchaser from a cartel. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). If as is highly likely a purchaser from the cartel (the "direct purchaser") passes on a portion of the cartel overcharge to his customers (the "indirect purchasers" from the cartel), the latter are injured and an award of damages would redress their injury. So there would be Article III standing. But to allow them to sue would greatly complicate litigation, first because the court would have to determine how much of the overcharge had been passed on, a difficult question of incidence analysis, and second because there would be tiers of plaintiffs complaining about the same violation of law.

But the prudential principles of standing, like other common law principles, are protean and mutable (the term "prudential" is the very antithesis of a definite rule or standard). The Court decided in *Flast* that they should not stand in the way of challenges to "exercises of congressional power under the taxing and spending clauses of Art. I, § 8, of the Constitution," provided that the expenditure complained of is not just "an incidental expenditure of tax funds in the administration of an essentially regulatory statute" and that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." 392 U.S. at 102-03, 88 S. Ct. 1942. The Court found that this two-part test was satisfied by a challenge to the use of "the taxing and spending power . . . to favor one religion over another or to support religion in general." *Id.* at 103, 88 S. Ct. 1942.

The word "specific" in the passage we quoted from *Flast* turned out to be critical to the Court's later reasoning. By forbidding Congress to establish a national church, the establishment clause places a specific limitation on congressional appropriations, since the essence of an establishment of religion is government financial support. *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 668, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) ("for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity"); see also *Engel v. Vitale*, 370 U.S. 421, 430-31, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962). In *Valley Forge Christian College v. Americans United for Separation of*

Church & State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982), we learn that a taxpayer has standing to complain *only* about the violation of a limitation on Congress's power under Article I, section 8, of the Constitution to tax and (implicitly) to spend money to finance the exercise of the various powers granted to Congress by Article I. Taxpayers challenged the donation of a disused army hospital by a federal executive agency to a religious institution. The Court denied them standing because the transfer had not been made by Congress or pursuant to an exercise of Congress's taxing and spending powers; it had been made (by the agency) pursuant to Congress's power under Article IV, section 3, to dispose of U.S. property. *Id.* at 479-80, 102 S. Ct. 752.

To complete the edifice, *Bowen v. Kendrick*, 487 U.S. 589, 618-20, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988), held that taxpayers had standing to challenge grants by a federal agency to religious institutions pursuant to a statute that authorized grants to public and private institutions for services related to adolescents' sexual problems, even though the grants had not been made by Congress itself. *Kendrick* was a replay of *Flast*, where the complaint had been not about the statute itself, which said nothing about religion (there was such a complaint in *Kendrick* but the part of the Court's opinion dealing with that complaint does not relate to our case), but about the fact that in administering the statute the executive branch had made grants to religious institutions. Consistent with *Flast*, *Kendrick* reads *Valley Forge* as not requiring taxpayers to show that a statute violated the establishment clause; all they had to show was that a statute enacted pursuant to Congress's taxing and spending powers under Article I,

section 8 had been necessary for the violation to occur—it did not have to be sufficient. The violation was not completed until the executive branch acted, but the taxpayers still had standing to challenge it.

In *Valley Forge* the executive branch had simply given away surplus property, and while the property had probably been built or acquired with appropriated funds rather than donated to the government, the Court did not treat the transfer as an expenditure of appropriated funds. Similarly, in *In re United States Catholic Conference*, 885 F.2d 1020, 1027-28 (2d Cir. 1989), where standing to challenge the Internal Revenue Service's grant of a tax exemption to the Catholic Church was denied, there was no expenditure of appropriated funds and no challenge to the exercise of Congress's taxing and spending powers. Cf. *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L. Ed. 2d 556 (1984); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976); *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 3-4 (D.C. Cir. 1988).

The present case, however, is governed by *Kendrick*. The taxpayers here are complaining about the use of money appropriated by Congress under Article I, section 8, to fund conferences that various executive-branch agencies hold to promote President Bush's "Faith-Based and Community Initiatives." This is a program that the President has created by a series of executive orders. One order established an Office of Faith-Based and Community Initiatives in the White House. Others established Centers for Faith-Based and Community Initiatives in the various federal departments.

The stated goal of the conferences is to promote community organizations whether secular or religious, as explained in the conferences' website (www. dtiassociates.com/FBCI/):

> For years, faith-based and community groups have been assisting people in need. Unfortunately, the Federal government has often not been a willing partner to these groups in the provision of social services. President Bush has worked to change this. Since he took office, thousands of grassroots organizations have received training in the Federal grants process, and hundreds of these groups have successfully competed for Federal funds for the first time. The White House will host a new round of Conferences on Faith-Based and Community Initiatives to continue supporting the work of effective social service programs. The conferences will provide participants with information about the Federal funding process, available funding opportunities, and the requirements that come with the receipt of Federal funds. The conferences will also provide an opportunity to inform State and local officials about equal treatment regulations and other central elements of the Faith-Based and Community Initiative. The conferences will be supported by the Departments of Justice, Agriculture, Labor, Health and Human Services, Housing and Urban Development, Education, Commerce, and Veterans Affairs, the Small Business Administration, and the Agency for International Development.

The plaintiffs claim that in fact the conferences are designed to promote religious community organizations over secular ones.

The complaint—all we have to go on at this stage—is wordy, vague, and in places frivolous, as where it insinuates that the President is violating the establishment clause by "tout[ing] the allegedly unique capacity of faith-based organizations to provide effective social services"—as if the President were not entitled to express his opinion about such organizations. But the complaint is not entirely frivolous, for it portrays the conferences organized by the various Centers as propaganda vehicles for religion, and should this be proved one could not dismiss the possibility that the defendants are violating the establishment clause, because it has been interpreted to require that the government be neutral between religion and irreligion as well as between sects. *McCreary County v. American Civil Liberties Union of Kentucky*, —— U.S. ——, —— - ——, 125 S. Ct. 2722, 2733-34, 162 L. Ed. 2d 729 (2005); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 696, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-17, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989). Neutrality goes both ways; if the government merely wants to redress discrimination against religious providers of social services, it is not violating the establishment clause. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 839, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); *Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984); *Linnemeir v. Board of Trustees of Purdue University*, 260 F.3d 757, 765 (7th Cir. 2001). But these are the issues on the merits; the only question before us is the plaintiffs' standing to litigate the merits.

At argument the plaintiffs' counsel was unable to identify the appropriations that fund the conferences.

The complaint does, however, allege that the conferences are funded by money derived from appropriations, which means from exercises of Congress's spending power rather than from, say, voluntary donations by private citizens. There is no suggestion that these are appropriations earmarked for these conferences, or for any other activities of the various Faith-Based and Community Initiatives programs, or for a statute pursuant to which the programs were created. The money must come from appropriations for the general administrative expenses, over which the President and other executive branch officials have a degree of discretionary power, of the departments that sponsor the conferences. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2853, 3115-16, 3136, 3150, 3311-12; Department of Homeland Security Appropriations Act, 2005, Pub. L. No. 108-334, 118 Stat. 1298-99.

The difference, then, between this case on the one hand and *Flast* and *Kendrick* on the other is that the expenditures in those cases were pursuant to specific congressional grant programs, while in this case there is no statutory program, just the general "program" of appropriating some money to executive-branch departments without strings attached. The difference cannot be controlling. Suppose the Secretary of Homeland Security, who has unearmarked funds in his budget, decided to build a mosque and pay an Imam a salary to preach in it because the Secretary believed that federal financial assistance to Islam would reduce the likelihood of Islamist terrorism in the United States. No doubt so elaborate, so public, a subvention of religion would give rise to standing to sue on other grounds, just as in the St. Charles cross case; taxpayer standing

in the hypothetical mosque case would not be essential to enabling a suit to be brought in federal court to challenge the violation of the establishment clause. But it would be too much of a paradox to recognize taxpayer standing only in cases in which the violation of the establishment clause was so slight or furtive that no other basis of standing could be found, and to deny it in the more serious cases.

At the other extreme, the fact that almost all executive branch activity is funded by appropriations does not confer standing to challenge violations of the establishment clause that do not involve expenditures. Imagine a suit complaining that the President was violating the clause by including favorable references to religion in his State of the Union address. The objection to his action would not be to any expenditure of funds for a religious purpose; and though an accountant could doubtless estimate the cost to the government of the preparations, security arrangements, etc., involved in a State of the Union address, that cost would be no greater merely because the President had mentioned Moses rather than John Stuart Mill. In other words, the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause would be zero. But in the hypothetical case of the mosque, and in the real though much less dramatic case before us, the objection is to a program for which money undoubtedly is "appropriated," albeit by executive officials from discretionary funds handed them by Congress, rather than by Congress directly.

The government asks us to shift the line so that it runs not between the Presidential (or other official) speech and a Presidential initiative (the conferences), but between the speech and the initiative, on the one

hand, and grants made pursuant to the initiative, on the other hand. The conferences are concerned in part with instructing the attendants on how to apply for government grants for their religious organizations; but the challenge that is before us is not to the grants but to the conferences. The line proposed by the government (no standing to challenge the conferences, standing to challenge the grants) would be artificial because there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause (which despite its wording applies to executive as well as congressional action, *American Civil Liberties Union of Illinois v. City of St. Charles*, *supra*, 794 F.2d at 270) without making outright grants to religious organizations. For the government to operate a mosque or other place of worship would not involve a grant unless a contractor was involved.

We are mindful that the Court in *Flast* carved an exception for "an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Flast v. Cohen*, *supra*, 392 U.S. at 102, 88 S. Ct. 1942. We may put to one side "regulatory" and focus on "incidental." That is a relative term. Whether an expenditure is incidental depends on what it is deemed incidental to. Every government expenditure could be thought incidental to the great goal of the public welfare, a pursuit that costs the federal government some $2 trillion a year, to which the cost of a mosque would certainly be incidental. The Department of Homeland Security alone has a budget of more than $30 billion, compared to which the funds required for the construction of a mosque would be small—and therefore "incidental"? The religiously oriented programs challenged in *Kendrick* were incidental to the goal of solving

problems of adolescent sexuality, but this did not negate taxpayer standing. If the conferences at issue in this case are, as the plaintiffs charge, intended to promote religion, the fact that their cost is slight relative to the budgets of the various departments that sponsor them does not make that cost incidental. Otherwise, indeed, there would be no federal taxpayer standing in any case.

The word "incidental" in *Flast* should be reserved for such cases as that of the government's expenditure on an armored limousine to transport the President to the Capitol to deliver the State of the Union address in which he speaks favorably of religion. Or to the government's expenditure on processing the Catholic Church's application in *In re United States Catholic Conference*, *supra*, for a tax exemption. So while it is true that the executive branch would quickly grind to a halt without general budget appropriations from Congress, our analysis, tracking *Kendrick*, would not permit an individual citizen to challenge just any action of the executive with which he disagrees as a violation of the establishment clause.

The hypothetical case of standing to challenge a Presidential speech extolling religion turns out not to be entirely hypothetical. One of the defendants in this case is a former Secretary of Education, Rod Paige, whom the plaintiffs accuse not of sponsoring or administering conferences under the President's Faith-Based and Community Initiatives program but of having given a speech at one of them in which he said that "President Bush does this because he knows first-hand the power of faith to change lives—from the inside out. And the reason he knows this is because faith changed his life." The district judge was right to rule that the

plaintiffs had no standing to sue Paige because of that remark, just as he was right to rule, in a part of the case not before us, that the plaintiffs do have standing to challenge actual grants made to faith-based organizations pursuant to the President's initiative. (The judge went on to dispose of that phase of the case on summary judgment, but the appeal does not challenge his disposition.)

We must consider finally the bearing of a line of cases, illustrated by *United States v. Richardson*, 418 U.S. 166, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974), and *Public Citizen, Inc. v. Simon*, 539 F.2d 211, 217-19 (D.C. Cir. 1976), in which taxpayer standing to enforce provisions of the Constitution other than the establishment clause was rejected. The *Public Citizen* suit complained that federal employees were illegally assisting in President Nixon's reelection campaign. The court rejected "taxpayer standing to attack any executive action that draws on an outstanding appropriation on the ground that the purchases or services are not in accord with the congressional intent in passing the appropriation. This would place the judiciary in the role of management overseer of the Executive Branch. Such oversight is a function of Congress . . . . When what is involved is expenditures in implementation of a regulatory statute, or mere executive activity that entails some expenditures, there is no . . . arrow aimed at taxpayers as a class, but an activity of concern to the public at large." Federal employees employed in programs of unquestioned constitutionality cannot be sued by taxpayers simply because they divert some of their work time to improper purposes—just as the President

could not be sued for a speech extolling religion even in the unlikely event that the speech violated the establishment clause.

So if the plaintiffs acknowledged the underlying constitutionality of the Faith-Based and Community Initiatives program, the fact that government employees involved in the program sometimes wandered out of the neutral zone would not confer standing to sue. But since the program itself is challenged as unconstitutional, the fact that it was funded out of general rather than earmarked appropriations—that it was an executive rather than a congressional program—does not deprive taxpayers of standing to challenge it. Taxpayers have standing to challenge an executive-branch program, alleged to promote religion, that is financed by a congressional appropriation, even if the program was created entirely within the executive branch, as by Presidential executive order. We therefore vacate the judgment and remand the case for a determination of the merits of those claims that we have determined the plaintiffs have standing to litigate.

VACATED and REMANDED, WITH DIRECTIONS.

RIPPLE, Circuit Judge, dissenting.

Today, the panel majority holds that executive conduct alleged to have violated the Establishment Clause may be challenged by federal taxpayers so long as that conduct was financed in some manner by a congressional appropriation. Because I do not believe that the applicable Supreme Court precedent permits such a dramatic expansion of current standing doctrine, I respectfully dissent.

The modern doctrine of constitutional standing was hardborn and has endured a difficult adolescence. It

has now reached a stage of maturity, however, where several milestones in its growth have become important and well-established doctrine firmly ingrained in the Nation's jurisprudence. As an intermediate appellate court, we cannot ignore or treat as malleable what the Supreme Court has mandated.

The first of these principles is the Court's insistence that the core factors in the doctrine of standing are not simply prudential matters of judicial restraint but constitutional requirements rooted firmly in the Case and Controversy Clause of the Third Article of the Constitution. "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) (internal quotations and citations omitted); *see also Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). It is the first of these requirements-the need for a concrete injury—that must be the focus of our inquiry in this case. This "irreducible constitutional minimum" has required that the traditional formula for taxpayer standing, articulated by Chief Justice Warren in *Flast v. Cohen*, 392 U.S. 83, 102-03, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), be construed with "rigor." *Valley Forge Coll.*, 454 U.S. at 481, 102 S. Ct. 752. That formula requires that the federal taxpayer establish a logical link between his status as a taxpayer and the type of legislative enactment attacked, which for taxpayers can be only an exercise of the congressional power under

the Taxing and Spending Clause of Article I, § 8 of the Constitution. It also requires that the taxpayer establish a nexus between his status as a taxpayer and the precise nature of the constitutional infringement alleged. *Flast* at 102, 88 S. Ct. 1942. It is undisputed that the question before us requires that we focus on the first of these requirements and ask whether the plaintiffs have, in the allegations of their complaint, set forth with sufficient rigor a nexus between their status as taxpayers and an exercise of the congressional power under the Taxing and Spending Clause.

Before turning to a definitive answer to that question, we should pause for a moment and reflect on why the Supreme Court requires that we examine this assertion of nexus so rigorously. Taxpayer standing "pushes the envelop" on traditional notions of constitutional standing. Ever since *Frothingham v. Mellon*, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923), the specter of a citizen bringing a lawsuit in a federal court to rectify an undifferentiated injury has loomed prominently over the development of our standing jurisprudence. Any assertion of taxpayer standing comes close, dangerously close, to becoming such a case. A lawsuit based on such undifferentiated injury—a mere disagreement with the government policy—is hardly the case and controversy within the jurisdiction of the federal courts.

When the Supreme Court has been called upon to examine this first prong of the *Flast* analysis, its decisions so far have been grounded on the fact that the complaint really did not present a grievance linked to the Taxing and Spending Clause, but instead based on another constitutional provision. Therefore, in *United States v. Richardson*, 418 U.S. 166, 94 S. Ct. 2940, 41 L.

Ed. 2d 678 (1974), the Court rejected the assertion of taxpayer standing over a suit based on the Accounts Clause. Again in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974), the Court refused taxpayer standing to an individual who asserted a violation of the Incompatibility Clause. In *Valley Forge*, the Court similarly decided that a taxpayer suit that implicated the Property Clause, not the Taxing and Spending Clause, could not be maintained.

In this case, the gravamen of the plaintiffs' complaint is of course based on the Establishment Clause, a specific restriction on Congress' power to spend. But is it based on an exercise of the Taxing and Spending Clause? The plaintiffs ask that we answer that question in the affirmative because organizing and conducting the meetings in question involved the expenditure of government funds; the Government replies that the only funds involved are those made available to the President for the operation of his executive office. In its view, specific legislative expenditure under the taxing and spending power is simply not at stake. Rather, the object of the plaintiffs' complaint is the decision of the President to use the funds to conduct these meetings.

My colleagues take the view that, if a taxpayer can challenge the expenditure of government funds under a specific appropriation, they ought to be able to question an expenditure under a general appropriation as well. In my view, this approach, while possessing an initial appeal, simply cuts the concept of taxpayer standing loose from its moorings. The Court's post-*Flast* holdings make it clear that taxpayer standing survives as a narrow exception to *Schlesinger*, *Richardson* and *Wright*' s ban on generalized grievances. It has sur-

vived, even on those narrow terms, only because of the inherent difficulty in enforcing the specific prohibition of the Establishment Clause against the expenditure of government funds for the establishment of religion. *See Flast*, 392 U.S. at 103, 88 S. Ct. 1942. Beneficiaries of such spending have no incentive to sue, and non-beneficiary outsiders cannot show a direct injury. *Flast* allows standing in these cases so that tax- and expenditure-based violations of the Establishment Clause do not go unremedied. The Supreme Court has made the judgment that the values embodied in the Case and Controversy Clause—separation of powers and the adversary process[1] —are sufficiently protected when a taxpayer makes a specific objection linked to a specific exercise of the taxing and spending power on the ground that it violates the Establishment Clause.

Indeed, a good illustration of *Flast* 's limited purpose is the part of this case, no longer part of this appeal, in which Freedom from Religion challenged specific grants that it alleged were distributed preferentially to religious organizations under the government's faith-based programs. One of these grant programs was "Mentoring Children of Prisoners," established by Congress in the Promoting Safe and Stable Families Amendments of 2001, Pub. L. No. 107-133, 115 Stat.

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[1] See *Flast* v. *Cohen*, 392 U.S. 83, 94-95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968) ("Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.")

2414 (2002). The program's purpose was to provide support for children with incarcerated parents, and it expressly made eligible for funding faith- and community-based organizations. An organization called MentorKids USA applied for and received a grant under the congressional program. With its stated mission to "exalt the Lord Jesus Christ as the Son of God," MentorKids hired only Christians as mentors, and required its mentors to give monthly reports on the progression of their mentee's "relationship with God." R.53 at 9-10. On the allegation that Congress had made public funds available to MentorKids, the district court, quite properly, allowed taxpayer standing to challenge the grant.

Without the *Flast* exception, it is unlikely that anyone would have had standing to sue in such a situation. Certainly, MentorKids was not going to challenge the grant it received. Similarly, non-sectarian community groups who applied for, but were denied a grant under the same program, would not have been able to satisfy the injury-in-fact and redressibility requirements of conventional standing doctrine; their injury would have been indirect and their allegations that they would have received funding but for the preferential treatment of religious groups would have been too speculative.[2] Fi-

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[2] *Cf. Allen v. Wright*, 468 U.S. 737, 757, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) (holding that parents lacked standing to challenge tax-exempt status of discriminatory private schools because it was too "speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies"); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42, 96 S.Ct. 1917, 48 L. Ed. 2d 450 (1976) (denying standing to challenge the tax-exempt status of hospitals who refused care to indigents because the injury to plaintiffs was highly indirect and "result[ed] from the independent action of some third party not before the court"). Likewise, as the Court pointed out in *Warth v.*

nally, an individual plaintiff who came into direct contact with MentorKids and was offended by the group's religious message could not sue for violation of the Establishment Clause because MentorKids is not a state actor. *Flast*, therefore, remains necessary to allow challenges to situations in which Congress makes no public endorsement of religion but nevertheless supports a sectarian cause through the transfer of public funds. *See Flast*, 392 U.S. at 103, 88 S. Ct. 1942 ("Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general."); *see also, e.g., Pulido v. Bennett*, 860 F.2d 296, 297 (8th Cir. 1988) (allowing taxpayer standing to bring an establishment clause challenge against a spending program that channeled funding to parochial schools).

Because the *Flast* exception serves such a narrow purpose, its application has been confined to its express terms. After *Schlesinger*, *Richardson* and *Valley Forge*, to earn taxpayer standing a plaintiff must bring an attack against a disbursement of public funds made in the exercise of *Congress'* taxing and spending power; focus on a program originating in the executive branch will not suffice. *See Valley Forge*, 454 U.S. at 479, 102 S.Ct. 752 ("*Flast* limited taxpayer standing to challenges directed only at exercises of congressional power") (internal quotation marks and alterations omitted); *Schlesinger*, 418 U.S. at 228, 94 S. Ct. 2925 (denying standing because the taxpayer plaintiffs "did not

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Seldin, "the indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirement of Art. III." 422 U.S. 490, 505, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch").

Bowen v. Kendrick, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988), did not alter the strictures on taxpayer standing. In *Bowen*, the Court upheld taxpayer standing to lodge an Establishment Clause challenge against the Adolescent Family Life Act ("AFLA"), a congressional spending program whose administration was delegated to the Secretary of Health and Human Services. Rejecting the Secretary's argument that funds were distributed by an executive branch agency rather than by Congress, the Court observed that "[t]he AFLA is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the AFLA's statutory mandate." *Id.* at 619-20, 108 S. Ct. 2562. That executive officials had been delegated the actual authority to write the checks did not matter. *Id.* at 619, 108 S. Ct. 2562 ("We do not think . . . that appellees' claim that AFLA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary."). The touchstone of the *Flast* inquiry, according to *Bowen*, was whether the Secretary had been "given authority under the challenged statute to administer the spending program that *Congress had created*." *Id.* (emphasis added).

I cannot accept my colleagues' contention that *Bowen* broadens taxpayer standing so that it is sufficient for plaintiffs to show merely that a congressional appropriations statute enabled the executive branch to vio-

late the Establishment Clause. Such a standard makes virtually any executive action subject to taxpayer suit. The executive can do nothing without general budget appropriations from Congress and the approach of my colleagues will permit an individual citizen to challenge any action of the executive with which he disagrees, as violative of the Establishment Clause. *Bowen* simply did not sanction such a judicial intrusion into the affairs of the executive at the request of an individual who can assert no specific connection between his status as a taxpayer and the executive decision. *See Bowen*, 487 U.S. at 620, 108 S. Ct. 2562 ("In this litigation there is still a sufficient nexus between the taxpayer's standing as taxpayer and the congressional exercise of taxing and spending power . . . ."). In short, my colleagues expand the narrow concept of taxpayer standing to the point where it cannot be distinguished from the citizen standing that the Supreme Court has regarded, throughout the development of the modern standing doctrine, as destructive of the case and controversy limitation on the power of the federal courts to intrude into the decision-making prerogatives of the executive branch.

The majority's position sets this circuit on a course different from that of the other courts to have applied the *Flast* exception after *Bowen*. The Court of Appeals for the District of Columbia Circuit, when asked by municipal taxpayers to prohibit the District of Columbia from expending public funds to oppose citizens' initiatives, observed that the "[Supreme] Court has never recognized federal taxpayer standing outside [of *Flast's*] narrow facts, and it has refused to extend Flast to exercises of executive power." *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 3-4

(D.C. Cir. 1988) (citations omitted). Similarly, in *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), the Court of Appeals for the Second Circuit denied taxpayer standing to pro-choice supporters who alleged that the IRS, by granting tax-exempt status to the Catholic church, had violated the Establishment Clause. The court reasoned:

> Plaintiffs in the instant case do not challenge Congress' exercise of its taxing and spending power as embodied in § 501(c)(3) of the [Tax] Code; they do not contend that the Code favors the Church. . . . Instead, they argue that the IRS, in allegedly closing its eyes to violations by the Church, is disregarding the Code's mandate and the Constitution. The complaint centers on an alleged decision made solely by the executive branch that in plaintiffs' view directly contravenes Congress' aim. The instant case is therefore distinguishable from [*Bowen v. Kendrick*]. In that case, there was "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute." *Kendrick*, 108 S. Ct. at 2580. Here, there is no nexus between plaintiffs' allegations and Congress' exercise of its taxing and spending power. Hence, *Kendrick* does not alter the requirements of taxpayer standing to allow the instant plaintiffs to challenge how the IRS administers the Code.

Id. at 1028. In short, the Second Circuit squarely held that the alleged *executive branch misapplication* of a statutory tax exemption enacted by Congress under its Taxing and Spending Power is, under prevailing Supreme Court precedent, insufficient to support tax-

payer standing. Like an arguably illegal executive expenditure (like the one alleged in this case), the misapplication of a tax exemption impacts the congressional policy decision embodied in the statute. It is not, however, an attack on Congress' exercise of the Taxing and Spending Power.

As these cases demonstrate, our sister circuits have refused to interpret *Bowen* as affording taxpayer standing based simply upon a showing that a statute enabled the executive branch to violate the Establishment Clause. This circuit ought to follow the same course and, in the process, adhere to the principles set forth in the Supreme Court's case law. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 04-C-381-S

FREEDOM FROM RELIGION FOUNDATION, INC. ANNE NICOL GAYLOR, ANNIE LAURIE GAYLOR, AND DAN BAKER, PLAINTIFFS

v.

JIM TOWEY, PATRICK PURTILL, BRENT ORRELL, BOBBY POLITO, RYAN STREETER, JOHN PORTER, JULIETE MCCARTHY, LINDA SHOVLAIN, DAVID CAPRARA, ELAINE CHAO, TOMMY THOMPSON, ROD PAIGE, JOHN ASHCROFT, AND DR. JULIE GERBERDING, DEFENDANTS

MEMORANDUM AND ORDER

Plaintiffs Freedom from Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor, and Dan Baker commenced this civil rights action in their capacity as taxpayers alleging violations of the Establishment Clause of the First Amendment and seeking declaratory and injunctive relief against defendants Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain,[1] David Caprara, Elaine Chao, Tommy Thomp-

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[1] Pursuant to Fed. R. Civ. P. 25(d)(1), defendant Linda Shovlain, the current Director of the Agency for International

son, Rod Paige, John Ashcroft, and Dr. Julie Gerberding. Jurisdiction is based on 28 U.S.C. § 1331. The matter is presently before the Court on defendants' partial motion to dismiss. The following facts are undisputed for the purposes of this motion.

BACKGROUND

Plaintiff Freedom from Religion Foundation, Inc. (FFRF) is a Wisconsin non-stock corporation with its principal place of business in Madison, Wisconsin. FFRF has more than 5,000 members who oppose government endorsement of religion in violation of the Establishment Clause, U.S. Const. amend. I. Plaintiffs Anne Nicol Gaylor, Annie Laurie Gaylor and Dan Baker are federal taxpayers and members of FFRF.

Defendant Elaine Chao is Secretary of the Department of Labor. Defendant Tommy Thompson is Secretary of the Department of Health and Human Services. Defendant Rod Paige is Secretary of the Department of Education. Defendant John Ashcroft is Attorney General and head of the Department of Justice. Defendant Dr. Julie Gerberding is Director of the Centers for Disease Control & Prevention.

Shortly after taking office President George W. Bush launched his Faith-Based and Community Initiative through a series of Executive Orders. *E.g.*, Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002). To assist the President in implementing this Initiative he created an office within the White House called the Office of Faith-Based and Community Initiatives (OFBCI). Exec. Order No. 13,199, 66 Fed. Reg. 8,499

Development Center for Faith-Based and Community Initiatives, is substituted for former director Michael Magan.

(Jan. 29, 2001). The President selected defendant Jim Towey to be Director of the White House OFBCI.

The President also issued a series of Executive Orders directing several Executive Branch agencies to establish Centers for Faith-Based and Community Initiatives to coordinate the President's Initiative within those agencies. Executive Order No. 13,198, 66 Fed. Reg. 8,497 (Jan. 13, 2001) (Justice, Education, Labor, Health & Human Services, Housing & Urban Development); Executive Order No. 13,280, 67 Fed. Reg. 77,145 (Dec. 16, 2002) (Agriculture, Agency for International Development); *see also* Executive Order No. 13,331, §§ 2(d), (3(b)(iii), 69 Fed. Reg. 9,911 (March 3, 2004) (assigning Faith-Based and Community Initiative coordinating role to the Chief Executive Officer of the Corporation for National and Community Service).

Defendant Patrick Purtill is the Director of the Department of Justice Center for Faith-Based and Community Initiatives. Defendant Bobby Polito is the Director of the Department of Health & Human Services Center for Faith-Based and Community Initiatives. Defendant Ryan Streeter is the Director of the Department of Housing & Urban Development Center for Faith-Based and Community Initiatives. Defendant John Potter is the Director of the Department of Education Center for Faith-Based and Community Initiatives. Defendant Juliete McCarthy is the Director of the Department of Agriculture Center for Faith-Based and Community Initiatives. Defendant Brent Orrell is the Director of the Department of Labor Center for Faith-Based and Community Initiatives. Defendant Linda Shovlain is the Director of the Agency for International Development Center for Faith-Based and Community Initiatives. Defendant David Caprara

is the Director of the Corporation for National and Community Service.

Plaintiffs allege in their amended complaint that the activities of defendants on behalf of the White House OFBCI and the agency Centers for Faith-Based and Community Initiatives are funded by Congressional budge appropriations made pursuant to Congress's Taxing and Spending authority, U.S. Const. art. I, § 8. Plaintiffs allege that in the course [of] implementing the President's Initiative defendants have used "Congressional taxpayer appropriations" in conducting certain activities to endorse and advance religion in violation of the Establishment Clause.

MEMORANDUM

Presently before the Court is defendants' motion to dismiss defendants Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain, David Caprara and Rod Paige. Defendants argue that plaintiffs have failed to demonstrate standing to pursue claims against these defendants. Plaintiffs rely on their status as federal taxpayers as the sole basis for standing.

Article III of the Constitution confines the exercise of federal judicial power to actual "cases" and "controversies." For plaintiffs to satisfy the case-or-controversy requirement of Article III, which is the "irreducible constitutional minimum" of standing, they must demonstrate that they have suffered an injury in fact, that the injury is fairly traceable to the actions of defendants, and that the injury will likely be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

As a general rule, a litigant's status as a federal taxpayer is insufficient to convey standing to challenge federal expenditures because his or her "interest in the moneys of the treasury . . . is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923).

In *Flast v. Cohen*, the United States Supreme Court recognized an exception to this general rule and established a two-part test that a litigant must satisfy to establish federal taxpayer standing:

> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

392 U.S. 83, 102-03 (1968). The Court found the second prong to be met in *Flast*, as it is here, because the taxpayers' challenge was based on the Establishment Clause, which the Court found to "operate[] as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8." *Id.* at 104.

Defendants argue that plaintiffs' allegations relating to defendants Towey, Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Shovlain and Caprara are insufficient to satisfy the first prong of the *Flast* test. Having now had the opportunity to review the parties submissions and the relevant procedents including *Frothingham*, *Flast*, *Valley Forge Christian College v. American United for Separation of Church & State*, 454 U.S. 464 (1982), and *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court has determined that plaintiffs lack standing to pursue their claims against defendants Towey, Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Shovlain and Caprara.

In *Valley Forge*, the United States Supreme Court determined that federal taxpayers lacked standing to bring an Establishment Clause challenge to a conveyance of federal property to a religious institution because the source of the taxpayers' complaint was not congressional action but a decision by an Executive agency to transfer a parcel of federal property. *Valley Forge*, 454 U.S. at 479. The Court construed *Flast* to limit taxpayer standing "to challenges directed only at exercises of congressional power." *Id.* (alterations and internal quotation marks omitted) (citing *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974)). In *Kendrick*, the Court clarified that the disbursement of federal funds by an Executive agency in

the administration of a congressional program could be challenged consistent with *Flast* where the program was, at its heart, a program of disbursement of funds pursuant to Congress's taxing and spending powers and the taxpayers' claims called into question how the funds authorized by Congress were being disbursed pursuant to the program's statutory mandate. 487 U.S. at 620.

Defendant Towey is Directory of the White House OFBCI. Plaintiffs allege in their complaint that Towey's actions in violation of the Establishment Clause "include the support of national and regional conferences . . . at which conference faith-based organizations are singled out as being particularly worthy of federal funding because of their religious orientation, and the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services." Plaintiffs allege that these conferences are "set up and run" by Towey and the Center for Faith-Based and Community Initiatives Director defendants, "and such events are intended to preferentially promote and advocate a climate conductive to funding of faith-based organizations, without similar advocacy for secular community-based organizations."

These allegations are insufficient to establish standing as to Towey. The view that federal taxpayers as such should be permitted to bring Establishment Clause challenges to all Executive Branch actions on the grounds that those actions are funded by congressional appropriations has never been accepted by a majority of the Supreme Court. The President established the White HOuse OFBCI by Executive Order and funded it with general budget appropriations. Consequently, Towey and his office have no congressional mandate. Rather, he acts at the President's request

and on the President's behalf. Towey is not, as was the case in *Kendrick*, charged with the administration of a congressional program. Consequently, Towey's actions are not "exercises of congressional power" as required by the *Flast* test.

Unlike Towey, the President has located defendants Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Shovlain and Caprara within agencies that administer congressional programs. Like Towey, however, these defendants are not charged with the administration of congressional programs. While these defendants coordinate the President's Initiative within their respective agencies, it is the agency-head defendants who administer the congressional programs. Accordingly, defendants Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Shovlain and Caprara are not proper parties to the plaintiffs' action. Plaintiffs do not have standing to challenge the actions of these defendants because their actions do not represent congressional power as required by the *Flast* test.

Finally, defendants move to dismiss defendant Secretary Rod Paige of the Department of Education. Defendants argue that plaintiffs have not identified or challenged a program administered by Paige in alleged violation of the Establishment Clause. Plaintiffs allege that Paige gave a keynote speech at a White House Conference on Faith-Based and Community Initiatives in October 2002 at which he made statements that gave the appearance of endorsing religion. These statements, however, are too far removed from any congressional action taken pursuant to the taxing and spending clause of Art. I, § 8, of the Constitution to satisfy the *Flast* test. Defendant Paige will be dismissed from plaintiffs' action.

ORDER

IT IS ORDERED that defendants' partial motion to dismiss defendants Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain, David Caprara and Rod Paige is GRANTED.

Entered this 15th day of November, 2004.

BY THE COURT:

/s/ JOHN C. SHABAZ
JOHN C. SHABAZ
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 04-C-381-S

FREEDOM FROM RELIGION FOUNDATION, INC. ANNE NICOL GAYLOR, ANNIE LAURIE GAYLOR, AND DAN BAKER, PLAINTIFFS

v.

JIM TOWEY, PATRICK PURTILL, BRENT ORRELL, BOBBY POLITO, RYAN STREETER, JOHN PORTER, JULIETE MCCARTHY, LINDA SHOVLAIN, DAVID CAPRARA, ELAINE CHAO, TOMMY THOMPSON, ROD PAIGE, JOHN ASHCROFT, AND DR. JULIE GERBERDING, DEFENDANTS

MEMORANDUM AND ORDER

Plaintiffs Freedom from Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor, and Dan Baker commenced this civil rights action in their capacity as taxpayers alleging violations of the Establishment Clause of the First Amendment and seeking declaratory and injunctive relief against defendants Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain, David Caprara, Elaine Chao, Tommy Thompson, Rod Paige, John Ashcroft, and Dr. Julie Gerberding. Jurisdiction is based on 28 U.S. S. § 1331. By Memorandum and Order dated November 15, 2004 the

Court granted defendants' partial motion to dismiss defendants Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain, David Caprara and Rod Paige for lack of standing. Thereafter plaintiffs voluntarily dismissed all but two claims relating to programs administered by defendant Thompson. The matter is presently before the Court on plaintiffs' motion for partial summary judgment and defendants' motions to dismiss and for summary judgment. The following facts are not disputed.

BACKGROUND

Plaintiff Freedom from Religion Foundation, Inc. (FFRF) is a Wisconsin non-stock corporation with its principal place of business in Madison, Wisconsin. FFRF has more than 5,000 members who oppose government endorsement of religion in violation of the Establishment Clause, U.S. Const. amend. I. Plaintiffs Anne Nicol Gaylor, Annie Laurie Gaylor, and Dan Baker are federal taxpayers and members of FFRF.

Defendant Tommy Thompson is Secretary of the Department of Health and Human Services (HHS). The Administration for Children and Families (ACF) is a federal agency located within HHS that administers the Compassion Capital Fund (CCF) program. The CCF program was created to increase the effectiveness of faith-based and community organizations (CFBOs) and enhance their ability to provide social services to those most in need. Social services contemplated by the CCF program include the "promotion treatment and prevention services related to primary health care, substance abuse treatment, mental health treatment, HIV/AIDS and related aspects of public health services directed to low-income families and individuals." HHS

Prog. Announcement No. 2002-14, 67 Fed. Reg. 39,561 (June 7, 2002). The CCF program provides funding to intermediary organizations that work to increase the capabilities of small CFBOs by providing training, technical assistance, and capacity-building sub-awards. ACF invites applications for CCF grants

> from a wide variety of types of organizations or entities that can demonstrate knowledge and experience in the provision of the types of technical assistance described herein to a diverse group [of] faith-based and community-based organizations representing different organizational or religious affiliations. Further, ACF encourages applications from applicants that propose to work with and have experience working with faith- and community-based organizations that historically have not been well served or supported by governmental funds and have the greatest needs.
>
> Nongovernmental organizations, non-profit agencies, including faith-based organizations, public agencies, State and local governments, colleges and universities, and for-profit entities may submit applications under this announcement.

Id. at 39, 5654.

An independent panel of experts in the field reviews eligible CCF grant applications based on specific evaluation criteria designed to assess the proposed project's quality and likelihood of success: (1) the proposed program approach, including technical assistance strategy and plan for issuing sub-awards to diverse FBCOs; (2) the discussion of specific goals of the proposed project and expected benefits; (3) the description of staff that will be involved in implementing the

project and staff members' experience with providing similar support; (4) the needs of FBCOs in the applicant's geographic area and how the proposed project could meet those needs through technical assistance; (5) the description of the geographic area to be served, including whether the area is precisely defined and reasonable; and (6) the proposed budget and justification for the budget. The review panel's assessment is a primary factor in ACF's funding decisions, although ACF is allowed to consider other factors such as geographic diversity and the types of applicant organizations. *Id.* at 39,567-569.

In September 2002 ACF awarded a three-year CCF grant to the Interfaith Health Program with in the Rollins School of Public Health at Emory University. Emory uses the CCF grant to fund its Strong Partners Initiative.

The Strong Partners Initiative creates a partnership between Emory and eight or nine "Strong Partner Foundations" (SPFs). These foundations work with Emory to provide technical assistance and sub-awards to small FBCOs with limited resources. Emory described the origin of these SPFs in a "Sub-Award and Sub-Sub-Award Plan" that is submitted to ACF as follows:

> These foundations were formed when non-profit, ususally religious sponsored, hospitals or other health care assets were sold to for-profit buyers. Substantial portions of the proceeds of these transactions were used by the original sponsors to set up foundations which continue the original missions of the religious sponsors—usually a local variation on

the theme of enhancing the health of the community.

Emory explained in its grant application that it believes these foundations as to be "uniquely positioned" to assist it in advancing the goals of the CCF program:

> The Interfaith Health Strong Partners project draws upon the experience and strategic location of nine of these foundations with which we are familiar. Their grantmaking experience with local FBOs/CBOs allows this project, through the cooperation of the participating foundations, to select a diverse set of FBOs/CBOs which already have a reputation for best practices and sound stewardship.
>
> These foundations also provide a substantial source of matching funds for federal funds—a hard match of real private dollars flowing to the same set of FBOs which will be served by federal matching funds, and which serve the same set of health and human services as does the [Compassion Capital Fund].

Emory also provides three levels of technical assistance to SPFs and sub-awardees: it helps FBCOs to address specific "internal plumbing" issues within their organization (e.g., bookkeeping and strategic planning), develop evaluative and collaborative skills, and establish events for organizations sharing topics of concern.

Emory instructs SPFs to balance the following factors in selecting FBCOs to receive sub-awards: (1) the FBCO should not be totally dependent on the federal matching sub-award for survival; (2) it should be at a developmental stage where the combination of SPF funding, technical assistance, and federal matching sub-award will significantly build its organizational capac-

ity; (3) it should have a demonstrated ability to collaborate with other FBCOs and community partners; (4) it should have developed a strategic plan; (5) "The selected set ('handful') of [FBCOs] in your service area should reflect diversity of ethnicities and religious traditions. We expect this to increase in years two and three. We prefer [FBCOs] which serve the poor and disenfranchised; which have links to local congregations; and which attempt to engage body/mind/spirit."

In response to a query from Emory's CCF program officer regarding how its selection process is open and competitive, it stated that "each foundation conducts its own open, competitive grant application and selection process." Later in this document, Emory states that "[w]hile some of the foundations exercise a preference in their private grant making for competent applications which reflect their own religious heritage, none of them exclude applications from agencies representing other religious traditions or from non-religious [community-based organizations]." Later still, it described its process as follows:

> Interfaith Health Program staff consult with each foundation on their selection of federal sub-awardees, and thus have been able to reach agreement with the eight participating foundations on selections for federal sub-awards. Our considerations include:
>
> 1) Do the selections taken as a whole—some 30+ sub awardee [FBCOs] per year—represent diverse ethnic communities served; serve both urban and rural areas; address the full spectrum of HHS priorities; preferably attack some public health disparity; and cover a broad spectrum of religious and non-religious traditions?

2) Are there clusters of interest around which various sub-sets fo [sic] [FBCOs] can be organized to provide [technical assistance] to several organizations wrestling with common issues?

3) Are the selected [FBCO] leaders willing to work in collaborative fashion in the target community or on the focal social service/public health issue?

In the first budget period of the grant, SPFs made sub-awards to 19 faith-based organizations and 4 community-based organizations. In the second year, SPFs made sub-awards to 26 faith-based organizations and 5 community-based organizations.

Through the Family and Youth Services Bureau, ACF/HSS also administers the Mentoring Children of Prisoners grant program, which Congress established in the Promoting Safe and Stable Families Amendments of 2001, Pub. L. No. 107-133. Congress created the Mentoring Children of Prisoners program to provide support for children who face the negative present and future effects of having a parent who is incarcerated. Citing empirical findings that "mentoring is a potent force for improving children's behavior across all risk behaviors affecting health," Congress authorized the Secretary of HSS [*sic*] to make competitive grants to government, tribal, faith-based, and community organizations to facilitate mentoring relationships. *Id.* The program announcement for Mentoring Children of Prisoners grants includes the following statement regarding eligibility for grants:

> Those eligible to apply for funding under this grant competition include faith and community-based organizations, tribal governments or consortia, and state or local governments where sub-

> stantial numbers of children of prisoners live. Applicants must apply to establish new programs or to expand existing programs utilizing a network of public and private community entities to provide mentoring services for children of prisoners. Collaboration among eligible entities is strongly encouraged. All eligible organizations, including faith-based organizations, are eligible to compete on equal footing for Federal financial assistance used to support social service programs. No organization may be discriminated against on the basis of religion in the administration or distribution of Federal financial assistance under social service programs. Faith-based organizations are eligible to compete for Federal financial assistance while retaining their identity, mission, religious references, and governance. However, faith-based organizations that receive funding may not use Federal financial assistance, including funds, to meet any cost-sharing requirements, to support inherently religious activities, such as worship, religious instruction, or prayer. In addition, any participation in these activities by beneficiaries must be voluntary.

HHS Prog. Announcement No. ACYF/FYSB 2003-02, 68 Fed. Reg. 26,622-01, 26,624 (May 16, 2003).

MentorKids USA[1] is a mentoring organization located in Phoenix, Arizona. MentorKids applied for and received a three-year Mentoring Children of Prisoners grant in 2003.

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[1] Formerly known as MatchPoint of Arizona. Hereinafter, "MentorKids" will be used to refer to both MentorKids and its predecessor MatchPoint.

MentorKids' articles of incorporation state that it was created for specific purposes that include:

> To exalt the Lord Jesus Christ as the Son of God, the Savior of the World and the head of his church. (Matthew 16:13-18, Romans 10:8-11; Ephesians 5:23; Col. 1:15-19);
>
> . . . . [and]
>
> To propagate the gospel of the Lord Jesus Christ, as outlined in the Bible, at home and abroad, by way, of operating and maintaining missions, parsonages, and Christian educational institutions which may offer both religious and secular subjects, Christian camps, and Christian recreational facilities;

MentorKids recruits and hires only Christians as mentors. The MentorKids mentor application requires an essay entitled "Personal Testimony," which "should include your life before Christ, your conversion, and what your life is like now. Your life now should include who Jesus is for you, and how He affects our daily life." The essay also inquires: "Briefly describe how you might be able to share your Christian faith with a youth." Potential mentors receive a "fact sheet" stating that "mentors introduce children to the gospel of Jesus Christ, allowing them to build their lives on the solid foundation of God's love."

MentorKids requires its mentors to adhere to a Christian Statement of Faith and Code of Conduct. The current MentorKids training manual discusses issues including "Understanding the Love of God," "Understanding the Grace of God," and "Understanding God and Jesus as a Man for All People." The manual advises mentors to "pray for your mentee;" "if you are going to help your mentee understand who God is and His love,

you first must know who He is and understand His love;" "share your experience regarding God's grace in your life;" "read, act out or talk about Biblical examples of where Jesus showed grace to people;" "introduce your mentee to the scriptures and point out that John 3:16 states that Jesus is God's redemption plan for *everyone*." Later, the manual advises mentors to "pray and look for opportunities to share your faith. Be bold in speaking the truth of the gospel and sensitive to your mentee's response."

Mentors are required to provide monthly reports to their coordinator that assess whether their mentee "seems to be progressing in relationship with God." The monthly report also asks mentors to address whether their mentee has "discussed God;" participated in Bible Study;" "Attended Church;" or "accepted Christ this month."

In a 2003 memo to case managers, MentorKids' President John Gibson labeled the year as the "year of intentionality." Gibson described MentorKids' mission for the year as follows:

> As the ministry moves forward to a new era of excellence we plan to be much more intentional about introducing the kids in the program to Christ and nurturing their growth and foundation in Him. Note the Miniseries [sic] new Mission Statement: Our mission is to locate, train and empower mentors to be the presence of Christ to kids facing tough life challenges through one-on-one relationships. We pledge to provide the tools for you and your mentors to be equipped to maximize the possibility of the child developing an authentic life-changing relationship with Christ, through relevant bible discipling interphased with life skills. The mentor relationship

> will only last a season—the relationship between the child and their Savior will guide and comfort them every day, and last for eternity."

Similar references permeate MentorKids' website, board meeting minutes (e.g., MentorKids' "number one priority" is "to share the gospel of Jesus Christ with MatchKids so that they have an opportunity to know him"), and newsletters (e.g., "we want to be an intentional ministry; intentionally bringing kids into healthy maturity and a relationship with Jesus Christ").

The Fall 2003 newsletter describes a camp experience provided by MentorKids:

> Camp is designed to forge a lasting bond between our mentors and their kids, explains Program Director Bill Brittain. "In providing a sense of adventure and fun, we break down walls—between mentors and kids and between kids and Jesus. Everything we do during those three days creates an atmosphere which invites spiritual growth and an increased awareness of choices we have in our lives. Our goal is to see every young adult choose Christ—either through a first-time commitment or a deeper on- going relationship with Him. This year, we had six young adults choose Christ for the first time in their lives. That makes the whole camp worth it."

At his deposition, Gibson recognized that mentors are encouraged to expose their faith to mentees and that mentees regularly come to faith in Jesus Christ. He believes that kids who accept Jesus may be more successful in the program; a belief in God makes[s] it more likely that kids will stay out of trouble.

Confronted with this evidence, HSS [*sic*] has now suspended MentorKids' grant. The suspension will not

be lifted unless ACF's further review determines that MentorKids program is in full compliance with all relevant federal rules, regulations; and policies.

MEMORANDUM

Defendants have moved for summary judgment on plaintiffs' claim that the HSS [*sic*] grant to Emory University violates the Establishment Clause. Plaintiffs have moved for summary judgment that the HSS grant to MentorKids violates the Establishment Clause. Defendants initially filed a cross-motion relating to the MentorKids grant but then retracted it, suspended the grant, and moved to dismiss citing both Article III and prudential concerns relating to mootness and ripeness. Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

Compassion Capital Fund Grant to Emory University

Plaintiffs do not raise a facial challenge to the constitutionality of the CCF program. Instead, they argue that the grant program as applied to Emory University's Strong Partners Initiative violates the Establishment Clause because Emory University and its SPF intermediaries give preferential treatment to religious organizations in their selection of organizations for subawards under the grant.

As a preliminary matter, defendants argue that plaintiffs lack standing to pursue their challenge to the Emory University CCF grant. This argument is unpersuasive. Pursuant to *Bowen v. Kendrick*, 487 U.S. 589 (1988), plaintiffs have standing as taxpayers to challenge the disbursement of federal funds to Emory University by HSS [*sic*] in the administration of the CCF program. The Establishment Clause operates as a specific constitutional limitation upon Congress's exercise of its taxing and spending power. *Flast v. Cohen*, 392 U.S. 83, 104 (1968). At its heart, the CCF program is a program of disbursement of funds pursuant to Congress's taxing and spending powers and plaintiffs' claim calls into question how the funds authorized by Congress are being disbursed pursuant to the program's statutory mandate. *Kendrick*, 487 U.S. at 620; *see also Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606, 610 (7th Cir. 2001).

Religious freedom is basic to this nation. Many of those who formed this nation or immigrated to it left their homelands to escape religious persecution seeking the right to worship without government interference. The First Amendment to the United States Constitution guarantees this right to worship without government interference by providing that "Congress shall

make no law respecting an establishment of religion." Though there have been a variety of approaches to defining when state action violates the Establishment Clause the heart of the clause is that government, state or federal, should not prefer one religion to another or religion to irreligion. *Freedom From Religion Foundation, Inc. v. Thompson*, 920 F. Supp. 969, 972 (W.D. Wis. 1996) (citing *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994)).

In *Lemon v. Kurtzman*, the United States Supreme Court developed a three-pronged test to determine whether a statute or program complies with the Establishment Clause. 403 U.S. 602 (1971). Under this test, a program does not violate the Establishment Clause if (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement between government and religion. *Id.* at 612-13. In *Agostini v. Felton*, the Supreme Court modified the *Lemon* test, emphasizing the continuing importance of the first two prongs but determining that entanglement could be considered an aspect of the second prong's "effect" inquiry. 521 U.S. 203, 222-23 (1997).

In *Agostini*, the Court used "three primary criteria" in evaluating whether government aid has the primary effect of advancing religion: whether the statute or program in question "results[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement." *Id.* at 234.

Plaintiffs argue that Emory University and its SPF intermediaries define recipients of sub-awards under the CCF grant by reference to religion, giving preferential treatment to religious organizations. Plaintiffs

allege that this preference occurs at two levels. First, plaintiffs allege that Emory selected its SPFs because they were religious organizations. Second, plaintiffs allege that the SPFs give preferential considerations to religious organizations when awarding sub-grants.

Defendants do not dispute for the purpose of summary judgment that the exercise of such a preference would violate the Establishment Clause, as well as HHS regulations:

> Religious organizations are eligible, on the same basis as any other organization, to participate in any Department program for which they are otherwise eligible. Neither the Department nor any State or local government and other intermediate organizations receiving funds under any Department program shall, in the selection of service providers, discriminate for or against an organization on the basis of the organization's religious character or affiliation. As used in this section, "program" refers to activities supported by discretionary grants under which recipients are selected through a competitive process. As used in this section, the term "recipient" means an organization receiving financial assistance from an HHS awarding agency to carry out a project or program and includes the term "grantee" as used in 45 CFR Parts 74, 92, and 96.

45 C.F.R. § 87.1(b). Defendants argue that plaintiffs have failed to produce any evidence of this alleged preferential treatment. Plaintiffs rely entirely upon the grant record produced by defendants to satisfy their Rule 56(e) obligation to set forth specific facts showing that there is a genuine issue for trial. Plaintiffs have produced no responses to interrogatories, affidavits, or

depositions of individuals with personal knowledge of Emory's or its SPF's alleged exercise of religious preference in awarding sub-grants.

First, plaintiffs allege that Emory selected its SPFs because they were religious organizations. Plaintiffs rely solely on the fact that each of the SPFs selected by Emory is a faith-based organization to prove this allegation. Plaintiffs have produced no evidence that Emory relied on religion as a criterion in selecting its SPFs. The grant application provides the only evidence of the criteria relied on by Emory in selecting SPFs:

> The Interfaith Health Strong Partners project draws upon the experience and strategic location of nine of these foundations with which we are familiar. Their grantmaking experience with local FBOs/CBOs allows this project, through the cooperation of the participating foundations, to select a diverse set of FBOs/CBOs which already have a reputation for best practices and sound stewardship.
>
> These foundations also provide a substantial source of matching funds for federal funds--a hard match of real private dollars flowing to the same set of FBOs which will be served by federal matching funds, and which serve the same set of health and human services as does the [Compassion Capital Fund].

Nothing within this statement or otherwise suggests that Emory selected its SPFs because they were religious organizations.

Second, plaintiffs allege that the SPFs give preferential consideration to religious organizations in their awarding of sub-grants. To prove the existence of this preference, plaintiffs rely on the fact that many (about

80%) of the organizations that received sub-grants from Emory and its SPFs are faith-based organizations. Plaintiffs characterize this as "disproportionate," but they fail to explain why or to provide any evidence that would permit evaluation of this claim. For example, there is no evidence how many faith-based and non-faith-based organizations applied for sub-awards. Moreover, the United States Supreme Court has suggested that Courts decline to engage in the type of analysis that plaintiffs' argument would require:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Mueller v. Allen, 463 U.S. 388, 401 (1983).

Plaintiffs also highlight isolated words and phrases used by Emory in its grant application to describe the type of FBCOs to which it hoped to make sub-awards. These words and phrases (like "holistic" and "body/mind/spirit") cannot be understood reasonably to have any inherently religious content, and plaintiffs have presented no evidence that Emory intended to impart them with religious content.

Finally, plaintiffs focus on one sentence that appears in a document which Emory submitted to HSS [*sic*] when asked to confirm that its selection process is open and competitive. After stating that each of its SPFs "conducts its own open, competitive grant application and selection process," Emory stated that "[w]hile some of the foundations exercise a preference in their private grant making for competent applications which reflect their own religious heritage, none of them exclude applications from agencies representing other religious traditions or from non-religious [community-based organizations]." Plaintiffs rely on the first clause of this sentence to show that there is a genuine issue for trial.

Plaintiffs' speculative interpretation of this one general, ambiguous clause is insufficient to survive summary judgment. Plaintiffs do not dispute that the grant application lists specific criteria which Emory expected SFSs to apply in making sub-awards. Emory instructs SPFs to balance the following factors in selecting FBCOs to receive sub-awards: (1) the FBCO should not be totally dependent on the federal matching sub-award for survival; (2) it should be at a developmental stage where the combination of SPF funding, technical assistance, and federal matching sub-award will significantly build its organizational capacity; (3) it should have a demonstrated ability to collaborate with other FBCOs and community partners; (4) it should have developed a strategic plan; (5) "The selected set ('handful') of [FBCOs] in your service area should reflect diversity of ethnicities and religious traditions. We expect this to increase in years two and three. We prefer [FBCOs] which serve the poor and disenfranchised; which have links to local congregations; and which attempt to engage body/mind/spirit." Within the same document

as plaintiffs' "smoking gun" clause, Emory specifically describes its process as follows:

> Interfaith Health Program staff consult with each foundation on their selection of federal sub-awardees, and thus have been able to reach agreement with the eight participating foundations on selections for federal sub-awards. Our considerations includes:
>
> 1) Do the selections taken as a whole—some 30+ sub awardee [FBCOs] per year—represent diverse ethnic communities served; serve both urban and rural areas; address the full spectrum of HHS priorities; preferably attack some public health disparity; and cover a broad spectrum of religious and non-religious traditions?
>
> 2) Are there clusters of interest around which various sub-sets fo [sic] [FBCOs] can be organized to provide [technical assistance] to several organizations wrestling with common issues?
>
> 3) Are the selected [FBCO] leaders willing to work in collaborative fashion in the target community or on the focal social service/public health issue?

Confronted with these neutral selection criteria, plaintiffs have failed to produce any evidence to corroborate their interpretation of the ambiguous sentence upon which they rely. This one ambiguous sentence, plucked from four hundred pages of grant application records, and plaintiffs' wholly unsubstantiated speculation as to the proper interpretation thereof, are insufficient to demonstrate the existence of a genuine issue of material fact.

Plaintiffs have failed to demonstrate the existence of a genuine issue of material fact as to Emory Univer-

sity's CCF grant. Accordingly, defendants are entitled to judgment as a matter of law. Defendants' motion for summary judgment will be granted.

Mentoring Children of Prisoners Grant to MentorKids USA

Plaintiffs move for summary judgment that HSS's Mentoring Children of Prisoners Grant to MentorKids USA violates the Establishment Clause. Plaintiffs argue that the MentorKids program is using the grant to promote religion.

Confronted with the evidence produced by plaintiffs in their motion for summary judgment, defendants acted on December 16, 2004 to suspend further funding of MentroKids' Mentoring Children of Prisoners Grant. Defendants represent that this suspension will not be lifted unless ACF's further review determines that MentorKids program is in full compliance with all relevant federal rules, regulations, and policies includeing 45 CFR § 87.1(c):

> Organizations that receive direct financial assistance from the Department under any Department program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the programs or services funded with direct financial assistance from the Department. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct financial assistance from the Department, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

Consequently, defendants raise jurisdictional and prudential mootness and ripeness concerns and ask the Court to dismiss plaintiffs' claim relating to the suspended grant.

In general, a defendant's voluntary cessation of a challenged practice does not deprive a federal court of the power to determine the legality of the practice. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1981). Defendants must bear the heavy burden to prove that there is no reasonable expectation that the wrong will be repeated. *Id.* Defendants have failed to meet this burden, having failed to provide sufficient assurances that the grant will not be reinstated.

Effectively conceding that federal funds have been used by the MentorKids program to advance religion in violation of the Establishment Clause, defendants do not attempt to set forth specific facts to show that there is a genuine issue for trial. Accordingly, plaintiffs are entitled to judgment as a matter of law.

ORDER

IT IS ORDERED that plaintiffs' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of plaintiffs against defendants declaring that the Mentoring Children of Prisoners grant to MentorKids USA is VACATED and further funding is DENIED as it relates to its present structure.

IT IS FURTHER ORDERED that defendants' motion to dismiss is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED as it relates to the Department of Health and Human Service's Com-

passion Capital Fund Grant to Emory University and is in all other respects DENIED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiffs AFFIRMING the Department of Health and Human Service's Compassion Capital Fund Grant to Emory University.

Entered this 11th day of January, 2005.

BY THE COURT:

/s/ JOHN C. SHABAZ
JOHN C. SHABAZ
District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1130
04 C 0381S-

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.
PLAINTIFFS-APPELLANTS

v.

ELAINE L. CHAO, SECRETARY OF DEPARTMENT OF LABOR, ET AL., DEFENDANTS-APPELLEES

May 3, 2006

Appeal from the United States District Court
for the Western District of Wisconsin

ORDER

Before HON. JOEL M. FLAUM, CHIEF JUDGE, HON. RICHARD A. POSNER, HON. FRANK H. EASTERBROOK, HON. KENNETH F. RIPPLE, HON. DANIEL A. MANION, HON. MICHAEL S. KANNE, HON. ILANA DIAMOND ROVNER, HON. DIANE P. WOOD, HON. TERENCE T. EVANS, HON. ANN CLAIRE WILLIAMS, HON. DIANE S. SYKES, Circuit Judges.

On March 13, 2006, defendants-appellees filed a petition for rehearing with suggestion of rehearing *en banc*. A vote of the active members of the Court was requested, and a majority has voted to deny the petition.[1] The petition is therefore DENIED.

FLAUM, Chief Judge, concurring in the denial of rehearing en banc.

Along with Judge Easterbrook, my vote to deny the petition for rehearing en banc is not premised upon a conclusion that the taxpayer standing issue as addressed in the panel opinion is free from doubt. Indeed, the position set forth in the dissent is one which could eventually command high court endorsement. However, the obvious tension which has evolved in this area of jurisprudence, as evidenced by the scholarly opinions of Judge Posner and Judge Ripple, can only be resolved by the Supreme Court. In my judgment, the needed consideration of this important issue by that tribunal would be unnecessarily delayed by our further deliberation.

EASTERBROOK, Circuit Judge, concurring in the denial of rehearing en banc.

My vote to deny the petition for rehearing en banc does not imply that I deem the panel's resolution beyond dispute or the issue unimportant. To the contrary, the subject is both recurring and difficult, and there is considerable force in Judge Ripple's dissent, 433 F.3d 989, 997-1001 (7th Cir. 2006), and in the

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[1] Chief Judge Flaum and Judge Easterbrook have written opinions concurring in the denial of the petition for rehearing *en banc*. Judge Ripple has written an opinion, which Judge Manion, Judge Kanne, and Judge Sykes have joined, dissenting from the denial of the petition.

standing analysis of Judge Sykes's dissent from *Laskowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006), which extends this panel's holding. Two divided decisions on related matters that put the judicial and the political branches of the federal government at odds imply the wisdom of further review. My vote to deny rehearing rests on a conclusion that this is not the right forum for that further deliberation.

The principal difficulty with arguments pro and con about taxpayer standing is that the doctrine is arbitrary. Taxpayers lack standing to complain about almost all expenditures. *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), held that taxpayer suits about religious outlays are special but declined to overrule *Frothingham v. Mellon*, 262 U.S. 447, 43 S. Ct. 597, 67 L.Ed. 1078 (1923), which holds that taxpayers lack standing to complain about public expenditures. To the extent that the Establishment Clause forbids taxation to support religion, people subject to the illegal levy may obtain relief, but plaintiffs in this litigation do not say that they have paid one extra penny because of the grant. Where's the concrete injury? The loss (if any) is mental distress that plaintiffs, who are bystanders to the challenged program, suffer by knowing about conduct that they deem wrongful. Article III does not permit courts to entertain such complaints. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *Allen v. Wright* 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976); *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L. Ed. 2d 678 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S. Ct. 2925, 41 L. Ed.

2d 706 (1974). Cf. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997). Yet *Flast* has so far resisted efforts either to cabin it or to incorporate its approach into a more general framework of justiciability.

Our panel's majority has concluded that the doctrine of taxpayer standing will be more logical if it covers administrative as well as legislative earmarks. I grant that proposition—but comprehensiveness and rationality are not this doctrine's hallmarks. Why may taxpayers complain about outlays of cash but not about a distribution of real or personal property? See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). Cash may be exchanged for property or the reverse; a distinction between cash and property for the purpose of standing is illogical but embedded in the cases.

Why may taxpayers complain about modest expenditures (the grant in *Laskowski* was $500,000, or less than a cent per U.S. taxpayer) but not about slightly smaller ones? According to the panel, a complaint that the President used the State of the Union Address to promote religion is not justiciable. The panel dismissed a claim against the Secretary of Education that rested on the expense that the Secretary had incurred to deliver a speech. See 433 F.3d at 995-96. The total cost of presidential proclamations and speeches by Cabinet officers that touch on religion (Thanksgiving and several other holidays) surely exceeds $500,000 annually; it may cost that much to use Air Force One and send a Secret Service detail to a single speaking engagement. If money from the Treasury is to supply the identifiable trifle for standing, then the only tenable line is between

$0 (no cost to taxpayers as a whole) and $1 (some cost, however dilute); yet the panel draws a line between $500,000 and $50,000 or $5,000 (even if there are lots of speeches or proclamations at $5,000 or $50,000 apiece). Where is the coherence in such a doctrine? That no court is willing (yet!) to entertain a suit about a speech that costs $50,000 to draft, deliver, and distribute through the Government Printing Office—while adjudicating objections to $500,000 grants that do not cost the plaintiff even 1¢—suggests problems in *Flast's* underpinning and application.

Perhaps Michael Newdow should have invoked his tax return, rather than his status as a father, to challenge the inclusion of "under God" in the Pledge of Allegiance. What is the price tag in both money and the opportunity cost of time to print many million copies of that phrase and read it daily in thousands of classrooms? As it was, however, the Supreme Court deemed his suit non-justiciable. See *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004). But this arbitrariness is built into the doctrine as it comes to us. Nothing we can do would eliminate the tension between *Flast* and *Bowen v. Kendrick*, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988), on the one hand, and *Frothingham* and *Valley Forge* (plus the many cases such as *Defenders of Wildlife*) on the other. The problem is not of our creation and cannot be resolved locally. There is no logical way to determine the extent of an arbitrary rule. Only the rule's proprietors can bring harmony—whether by extension or contraction—or decide to tolerate the existing state of affairs.

RIPPLE, Circuit Judge, with whom MANION, KANNE and SYKES, Circuit Judges, join, dissenting from the denial of rehearing en banc.

The Government has requested that the court hear this case en banc. Because the decision of the panel majority departs significantly from established Supreme Court precedent and creates an inter-circuit conflict, I believe that the Government's considered request reflects its serious concern about the impact of the panel majority's holding on executive governance. Therefore, I believe that the case should be set for rehearing en banc, and that a decision be rendered that reflects the view of the entire court. Indeed, because this case also reflects a view about the nature of Article III judicial power, the case has serious implications for judicial governance, and we, as officers of that branch, have a special duty to ensure that a decision expanding the authority that we claim for ourselves represents the considered judgment of every judge on this court. Such a review is especially appropriate when the Government specifically charges, as it has here, that the court has "greatly exceeded its authority by ignoring the Supreme Court's own rules . . . and substituting its own views of what the law rationally ought to be." Pet. Reh'g at 13.

The panel majority's opinion does not square with the Supreme Court's taxpayer standing cases beginning with *Flast v. Cohen*, continuing with *Valley Forge Christian College*, and ending most recently with *Bowen v. Kendrick*. In each of these cases, the plaintiffs' claims to taxpayer standing turned on the strength of the nexus demonstrated between their status as taxpayers and the challenged *congressional* expenditure. In *Flast*, taxpayers had shown such a

nexus because they alleged that *Congress* had violated the Establishment Clause by authorizing grants to parochial schools, even though the money passed through an executive agency. *Bowen* found a sufficient taxpayer nexus to challenge the constitutionality of a *congressional* spending program that allowed religious institutions to receive federal funds, even though the program was administered by the Secretary of Health and Human Services. By contrast, *Valley Forge* prohibited taxpayers from halting a purely executive decision to transfer surplus public land to a religious institution. What distinguished the *Valley Forge* plaintiffs from those in *Flast* and *Bowen* was that "the source of their complaint [was] not a congressional action, but a decision by [the executive agency] to transfer a parcel of federal property." *Valley Forge*, 454 U.S. at 479, 102 S. Ct. 752. In short, *Valley Forge* held that the constitutionally-required nexus between a plaintiff's status as taxpayer and "'exercises of congressional power'" erodes without an allegation that *Congress* has violated the Establishment Clause. *Id.* (quoting *Flast*, 392 U.S. at 102, 88 S. Ct. 1942).

Here, as in *Valley Forge*, the plaintiffs do not complain of any action taken by Congress. The plaintiffs never alleged that *Congress* violated the Establishment Clause by appropriating funds. Here, as in *Valley Forge*, there is no allegation that Congress authorized the challenged activities; and, as far as the record reflects, the challenged *executive* action involved no more incidental expenditure than the transfer of public land in *Valley Forge*. Nevertheless, the panel decision held that the plaintiffs had standing because the congressional appropriation was "necessary for the violation to occur," *Freedom from Religion Foundation, Inc.*

v. Chao, 433 F.3d 989, 993 (7th Cir.2006). Some expenditure of governmental funds is necessary for every executive action. That reality is present here as it was present in *Valley Forge*. However, the Supreme Court, in making an exception to usual standing rules for taxpayers has drawn a very clean line in order to avoid making the federal courts a forum for all sorts of complaints about the conduct of governmental affairs on no basis other than citizen standing. Abolishing or even diluting a standard so explicitly set by the Supreme Court simply is not an appropriate decision for us to make. We have a duty to apply faithfully the precedent of the Supreme Court until that precedent is overruled by the Supreme Court. *See State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997).

We also ought to hear this case en banc because the panel majority has created a clear conflict on this issue. Most to the point is *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989). There, the Court of Appeals for the Second Circuit denied taxpayer standing to pro-choice supporters who sought to challenge a decision by the IRS to grant tax-exempt status to the Catholic Church. Critically, as in *Valley Forge* and in this case, the plaintiffs had not asserted that Congress wrote the Internal Revenue Code in a manner that favored the Catholic Church. Nor had they alleged that the Code authorized the IRS to do what it was doing (allegedly closing its eyes to violations by the Church). Instead, "[t]he complaint center[ed] on an alleged decision made solely by the executive branch that, in plaintiffs' view, directly contravene[d] Congress' aim." *Id.* at 1028. The plaintiffs therefore had not established, as the Supreme Court requires, "a

sufficient nexus between the taxpayer's standing as a taxpayer and the *congressional* exercise of taxing and spending power." *Id.* (emphasis added). The present case is indistinguishable.[1]

Fortunately, this case not only meets the criteria for en banc review set forth in our rules, see Fed. R. App. P. 35, but also the criteria for certiorari review in the Supreme Court of the United States, *see* Sup. Ct. R. 10. This court has "decided an important federal question in a way that conflicts with the relevant decisions" of the Supreme Court. *See* Sup. Ct. R. 10(c). It also has "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). The Government therefore has one last forum in which to seek a return to traditional principles governing the right of a taxpayer to challenge a decision of the executive.

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[1] The panel majority's terse attempt to distinguish *In re United States Catholic Conference* on the basis of there being, in that case, "no expenditure of appropriated funds," *Freedom from Religion Foundation, Inc. v. Chao*, 433 F.3d 989, 993 (7th Cir. 2006), misses the mark. For purposes of taxpayer standing, a tax exemption is no different from a positive appropriation, and no less an exercise of Congress' power to tax and spend for the general welfare. *See* U.S. Const. art. I, sec. 8.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 04 C 0381 S

FREEDOM FROM RELIGION FOUNDATION, INC.; ANNE NICOL GAYLOR; ANNIE LAURIE GAYLOR; AND DAN BARKER, PLAINTIFFS

v.

JIM TOWEY, DIRECTOR OF WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES; PATRICK PURTILL, DIRECTOR OF DEPARTMENT OF JUSTICE CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; BRENT ORELL, DIRECTOR OF DEPARTMENT OF HEALTH AND HUMAN SERVICES CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; RYAN STREETER, DIRECTOR OF DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; JOHN PORTER, DIRECTOR OF DEPARTMENT OF EDUCATION CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; JULIETE MCCARTHY, DIRECTOR OF DEPARTMENT OF AGRICULTURE CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; MICHAEL MAGAN, DIRECTOR OF AGENCY FOR INTERNATIONAL DEVELOPMENT CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; DAVID CAPRARA, DIRECTOR OF CORPORATION FOR NATIONAL AND COMMUNITY SERVICE CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES; ELAINE CHAO, SECRETARY OF THE DEPARTMENT OF LABOR; TOMMY THOMPSON, SECRETARY OF THE DEPARTMENT OF HEALTH AND

HUMAN SERVICES; ROD PAIGE, SECRETARY OF THE DEPARTMENT OF EDUCATION; JOHN ASHCROFT, SECRETARY OF THE DEPARTMENT OF JUSTICE; DR. JULIE GERBERDING, DIRECTOR OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, DEFENDANTS

AMENDED COMPLAINT

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1. This is an action by the plaintiffs brought against the defendants alleging violations of the Establishment Clause of the First Amendment to the United States Constitution.

2. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331.

3. Venue is appropriate in the District Court for the Western District of Wisconsin pursuant to 28 U.S.C. § 1391 (e).

4. The plaintiff, the Freedom From Religion Foundation, Inc., ("FFRF") is a Wisconsin non-stock corporation whose principle office is in Madison, Wisconsin.

5. FFRF has more than 5,000 members, including federal taxpayers, who are opposed to government endorsement of religion in violation of the Establishment Clause of the First Amendment of the United States Constitution.

6. FFRF's purpose is to protect the fundamental constitutionl principle of separation of church and state by representing and advocating on behalf of its members.

7. The plaintiff, Anne Nicol Gaylor, is a federal taxpayer residing in Madison, Wisconsin, and she is a

member and the President of FFRF, and she is a nonbeliever who is opposed to governmental establishment of religion.

8. The plaintiff, Annie Laurie Gaylor, is a federal taxpayer residing in Madison, Wisconsin, and she is a member and employee of FFRF and the Editor of FFRF's periodical "FreeThought Today," and she is a nonbelieiver who is opposed to governmental establishment of religion.

9. The plaintiff, Dan Barker, is a federal taxpayer residing in Madison, Wisconsin, and he is a member of and an employee and Public Relations Director of FFRF, and he is a nonbelieiver who is opposed to governmental establishment of religion.

10. The plaintiffs are opposed to the use of Congressional taxpayer appropriations to advance and promote religion.

11. The defendant, Jim Towey, is the Director of the White House Office of Faith-Based and Community Initiatives, a duly created office of the Government of the United States, the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending authority of Article I, section 8, of the United States Constitution.

12. The activities of defendant Towey and his office are funded by Congressional budget appropriations, pursuant to Article I, section 8, of the Constitution, which Congressional appropriations are subject to the limitations of the Establishment Clause of the United States Constitution.

13. Congressional budget appropriations, including appropriations made for executive and administrative purposes, constitute legislation pursuant to Article I,

section 8, of the Constitution, which only Congress can make.

14. The President of the United States does not have authority to appropriate funds for the activities of defendant Towey and his office, without Congressional budget appropriations, and Towey's activities in his position and his office are subject to availability of Congressional budget appropriations, as recognized by Executive Order.

15. The defendant, Patrick Purtill, is the Director of the Department of Justice Center for Faith-Based and Community Initiatives, a duly created office of the Government of the United States, the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution.

16. The defendant, Bobby Polito, is the Director of the Department of Health and Human Services Center for Faith-Based and Community Initiatives, a duly created office of the Government of the United States, the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution.

17. The defendant, Ryan Streeter, is the Director of the Department of Housing and Urban Development Center for Faith-Based and Community Initiatives, a duly created office of the Government of the United States, the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provisions of the Constitution.

18. The defendant, John Porter, is the Director of the Department of Education Center for Faith-Based and Community Initiatives, a duly created office of the

Government of the United States, the activities of which are funded annually by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution.

19. The defendant, Juliete McCarthy, is the Director of the Department of Agriculture Center for Faith-Based and Community Initiatives, a duly created office of the Government of the United States, the activities of which are funded by Congressional tax appropriations, pursuant to the Taxing and Spending provision of the Constitution.

20. The defendant, Brent Orrell, is the Director of the Department of Labor Center for Faith-Based and Community Initiations [*sic*], the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution.

21. The defendant, Michael Magan, is the Director of the Agency for International Development Center for Faith-Based and Community Initiatives, a duly created office of the Government of the United States, the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution.

22. The defendant, David Caprara, is the Director of the Corporation for National and Community Service, a duly created office of the Government of the United States, the activities of which are funded by Congressional budget appropriations, pursuant to the Taxing and Spending provision of the Constitution.

23. The activities of the defendants, Purtill, Orell, Polito, Streeter, Porter, McCarthy, Magan and Caprara, are funded by Congressional budget appropria-

tions made respectively to the Department of Justice, Labor, Health and Human Services, Housing and Urban Development, Education, Agriculture, the Agency for International Development, and the Corporation for National and Community Service, pursuant to Article I, section 8, of the Constitution, and which Congressional appropriations are subject to the limitations of the Establishment Clause of the United States Constitution.

24. The Congressional budget appropriations for the activities of the defendants, Purtill, Orell, Polito, Streeter, Porter, McCarthy, Magan and Caprara, derive from the authroity of Congress to appropriate tax money under the Taxing and Spending provision of the Constitution, and these defendants' activities are expressly made subject to the availability of adequate budget appropriations, as recognized by Executive Order.

25. The defendant, Elaine Chao, is the Secretary of the Department of Labor, a duly created office of the Government of the United States.

26. The defendant, Tommy Thompson, is the Secretary of the Department of Health and Human Services, a duly created office of the Government of the United States.

27. The defendant, Rod Paige, is the secretary of the Department of Education, a duly created office of the Government of the United States.

28. The defendant John Ashcroft, is the Attorney General of the United States and head of the U.S. Department of Justice, a duly created office of the Government of the United States.

29. The defendant, Dr. Julie Gerberding, is the Director of the Centers for Disease Control and Prevention, a duly created office of the Government of the United States.

30. The defendants have engaged in and are engaged in activities that violate the Establishment Clause of the First Amendment to the United States Constitution.

31. The defendants' actions have violated the fundamental principle of the separation of church and state by using Congressional taxpayer appropriations, made pursuant to the Taxing and Spending provision of the Constitution, to support activities that endorse religion and give faith-based organizations preferred positions as political insiders.

32. Defendants' actions, including by Towey, Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Magan, Caprara, Chao, Thompson and Ashcroft, include the support of national and regional conferences, which are funded with Congressional budget appropriations, made pursuant to Article I, section 8, of the Constitution, and at which conferences faith-based organizations are singled out as being particularly worthy of federal funding because of their religious orientation, and the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services.

33. Keynote speeches have been made at such national and regional conventions, for example, such as by defendant Paige at a White House Conference on Faith-Based Community Initiatives in October of 2002, at which he made the following statements that give the appearance of endorsing religion:

"With the stroke of a pen, the President signaled that this Administration will knock down any barrier, will do whatever it takes to get people of faith and goodwill involved in helping solve some of the problems in our society today.

Now, President Bush does this because he knows first-hand that power of faith to change lives—from the inside out. And the reason he knows this is because faith changed his life . . .

He grew up in church, but like most of us, he didn't always walk the walk. Many years ago, at a particularly low point in his life, he realized that something was missing. Fortunately for him, he bumped into the Reverend Billy Graham. And they had a long, long, long conversation. And he made a decision coming out of that conversation that changed his life. And he believes that if it can change his life, it can change the lives of others as well. And that is why he is so committed to this.

So the reason we're all here today is not because some politician needs to knock off one more thing on his 'to do' list. We are here because we have a President, who is true, is a true man of God. A man who prays every day. And I think together, we can really make a difference for mankind, for Americans, we can make America a better place. We can, and I enjoyed the prayer, as we began, served, getting food. He said, if the Jews could be better Jews, and if Christians could be better Christians, if all of us could just be a little better ourselves, what a difference that would make in this world, what a difference that would make.

So, he has made it his mission to level the playing field so good people who used to get left out of the process can now act on their spiritual imperative and can help others make a difference and can be partners with the federal government.

He's created this new initiative, because he knows you have tremendous powers to change lives. You have tremendous powers to make lives better. In many communities, you are the last line of defense. And when it comes to our nations' children, we need your help, big time . . .

The President has called upon my help to achieve this end. As United States Secretary of Education, he's asked me to lead this initiative. He said to me, I need your help. Well, guess what. I 'm here today to say to you, I need your help. I need your help. I need America's help, but most especially, the good people of faith. We need your help . . .

The federal government can provide funds, we can make laws, but we cannot provide love and faith and compassion. That's where you come in. You can do that. No one can do that better."

34. President George Bush also has spoken at such national and regional conferences, including the first White House National Conference on Faith-Based and Community Initiatives, held in June of 2004, at which the President touted the allegedly unique capacity of faith-based organizations to provide effective social services, including by singling out alleged exemplary stories and anecdotes, all of which focused on faith-based organizations, to the exclusion of other organizations.

35. President Bush also made representative statements at a Regional Conference on Faith-Based and Community Initiatives in March of 2004 in Los Angeles, California, at which event the President extolled the virtues of funding for faith-based organizations, in language that invoked religious imagery, such as references to "miracles," as well as telling many anecdotal stories about alleged exemplary faith-based programs and outcomes, to the exclusion of any mention of non-faith based community programs.

36. The conferences and public events organized, set up and run by the defendants, including the defendants Towey and the Director of the Centers for Faith-Based and Community Initiatives, are funded with Congressional budget appropriations, pursuant to Article I, section 8 of the Constitution, and such events are intended to preferentially promote and advocate a climate conducive to funding for faith-based organizations, without similar advocacy for secular community-based organizations; the advocacy and promotion of funding for faith-based organizations, moreover, is based upon their status as faith-based organizations per se, rather than on the basis of their status as community-based organizations.

37. The defendants, including at such national and regional conferences, send messages to non-adherents of religious belief that they are outsiders, not full members of the political community, and the defendants send an accompanying message to adherents of religious belief that they are insiders and favored members of the political community.

38. A reasonable observer of the defendants' actions and listener to their words would perceive the defendants to be endorsing religious belief over non-belief at

such governmentally sponsored events, and which events give the appearance of stating the government's official support for and advocacy of funding of faith-based organizations precisely because such organizations are faith-based.

39. The defendants, including Towey, Purtill, Orrell, Polito, Streeter, Porter, McCarthy, Magan and Caprara, organize, set up and conduct such public events to advance funding for faith-based organizations, using Congressionally enacted budget appropriations to conduct such advocacy, and which appropriations are made pursuant to Congress' Taxing and Spending authority.

40. The defendants' actions and/or words give support to and the appearance of endorsing a preference for the funding of faith-based organizations.

41. Defendants Towey and the Directors of the Centers for Faith-Based and Community Initiatives oversee the expenditure of Congressional budget appropriations, made pursuant to Article I, section 8, of the Constitution, to advocate and promote federal funding for faith-based organizations precisely because such organizations are faith-based, and which actions include the promotion of capacity building of faith-based organizations; the defendants engage in myriad activities, such as making public appearances and giving speeches, throughout the United States, intended to promote and advocate for funding for faith-based organizations; all of these funded activities give support to and the appearance of religious endorsement to reasonable observers and/or listeners, including because no comparable advocacy is made for secular community organizations.

42. The defendant Secretaries of the Departments of Labor, Health and Social Services, Education, and Justice, and the Director of the Centers for Disease Control and Prevention, further have directly and preferentially funded with Congressional taxpayer appropriations, pursuant to Article I, section 8, of the Constitution, services that integrate religion as a substantive and integral component, which also has the effect of establishing religion; such appropriations include funding for the Exodus Transnational Community, Inc., prisoner-reentry program, as part of the Ready (4) Work Initiative, co-funded by the Department of Justice and the Department of Labor, funding for Phoenix Match-Point Mentoring Program, funded by the department of Health and Human Services; Bridge to Hope Ministries, funded by a One-Stop Career Center grant from the Department of Labor; funding by the Department of Labor for its Ready (4) Work Initiative; funding for H.O.P.E. Center of Greater Community Temple Ministries Church of God in Christ, in Memphis, Tennessee, said grant made by the Department of Labor in 2003 at a regional conference; funding for Metro Atlanta Youth for Christ, in Decatur, Georgia, by the Department of Health and Human Services under its Mentoring Children of Prisoners Program; funding for Metro Atlanta Youth for Christ-Teen Moms Program, said funding provided by the Centers for Disease Control and Prevention in 2004 as part of a sexual abstinence program; funding for Faith Partners, in Colorado Springs, Colorado by the Department of Labor; and funding for Public/Private Ventures' contract to oversee a faith-based mentoring program involving Job Corps; each of these funding appropriations represents the spending of Congressional tax appropriations, made pursuant to Article I, section 8, of the Constitution, to fund pro-

grams administered by the respective agencies identified in this paragraph.

43. The defendant Secretaries and Director of the Centers for Disease Control also have funded intermediary faith-based organizations that preferentially award sub-grants to other faith-based organizations, including funding for the Interfaith Health Program of Rollins School of Public Health at Emory University, under a Department of Health and Human Services' Compassion Capital Grant, which grantee does not utilize objective criteria in making sub-awards; the Departments of Labor and Justice also have preferentially utilized faith-based organizations in the operation of their Ready (4) Work Program, in violation of any principle of neutrality.

44. The use of Congressional appropriations, made pursuant to Article I, section 8, of the Constitution, by the defendants gives actual preferences to and public appearances of government endorsement and advancement of religion.

45. The Congressional appropriations used to support the activities of the defendants convey a message that religion is favored, preferred, and promoted over other beliefs and non-belief.

46. The actions of the defendants in using Congressional taxpayer appropriations to endorse and advance religion violates the Establishment Clause of the First Amendment to the United States Constitution, including for example, the failure to assure that mentoring programs, such as Phoenix MatchPoint does not substantively incorporate religion, nor mentoring by Metro Atlanta Youth.

47. The actions of all the defendants in violating the Establishment Clause of the First Amendment to the United States Constitution are injurious to the interests of the plaintiffs individually, and to FFRF in its representative capacity, because the defendants' actions compel the plaintiffs to support the establishment, endorsement and advancement of religion, to which the plaintiffs object.

WHEREFORE, the plaintiffs demand judgement as follows: (a) For a judgement declaring that Congressional tax appropriations made by the defendants have been used in violation of the Establishment Clause of the First Amendment to the United States Constitution; (b) for an order enjoining the defendants from continuing to use appropriations in violation of the Establishment Clause of the First Amendment to the United States Constitution; (c) for an order requiring the defendants to establish rules, regulations, prohibitions, standards and oversight to ensure that future appropriations are not made and/or used to fund social service providers that include religion as an integral component of the funded activity; (d) for judgment awarding such further relief as the Court deems just and equitable; and (e) for judgement awarding the plaintiffs their reasonable costs, disbursements and attorney's fees, as allowed by law.

Dated this 9th day of September, 2004.

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APPENDIX F

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The First Amendment to United State Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.